TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 177.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND J. M. TUCKER, PLAINTIFFS IN ERROR,

vs.

EASTIN & KNOX, A FIRM COMPOSED OF S. W. EASTIN AND D. L. KNOX, AND THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED SEPTEMBER 10, 1907.

(20,852.)

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SUPREME COURT OF THE UNITED STATES.

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THE TEXAS AND PACIFIC RAILWAY COMPANY AND J. M. TUCKER, PLAINTIFFS IN ERROR,

vs.

EASTIN & KNOX, A FIRM COMPOSED OF S. W. EASTIN AND D. L. KNOX, AND THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

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1 *Caption.*

THE STATE OF TEXAS, *County of Parker:*

At a term of the District Court begun and holden within and for the County of Parker, at Weatherford, on the Third day of October, A. D., 1904, and which adjourned on the 22nd day of November, A. D., 1904, the Hon. J. W. Patterson, Judge thereof, presiding, the following cause came on for trial, to-wit:

In District Court, Parker County, Texas, April Term, A. D. 1904.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Plaintiffs' Original Petition.

Filed Feb. 4, 1904.

THE STATE OF TEXAS, *County of Parker:*

To the District Court of said County:

S. W. Eastin and D. L. Knox, plaintiffs, complaining of J. M. Tucker and the Texas & Pacific Railway Company, defendants, represent that the plaintiffs reside in the County of Jack, State of Texas, and that the defendant, J. M. Tucker, resides in the county of Palo Pinto, State of Texas, and that the defendant, the Texas & Pacific Railway Company is a body corporate, duly incorporated under the Federal Statutes, with an office and station in the counties of Palo Pinto and Parker, in the State of Texas.

That Plaintiffs are partners doing a cattle business under the firm name of Eastin & Knox.

That heretofore, to-wit: the 22nd day of April, A. D. 1902, the defendant, the Texas & Pacific Railway Company owned, possessed and operated a certain railroad extending through the counties of Palo Pinto, Parker, Tarrant, Denton, Grayson, Fannin and Lamar, in said state, and was then, and still is, engaged in the business of running railroad cars and operating same, and of transport-
2 ing cattle and other live stock and freight over said road, as a common carrier for hire.

That the said J. M. Tucker was at said time the agent of the said defendant company at the station of said company at Strawn, in the said county of Palo Pinto, and as such agent doing, attending to, and representing the said defendant Railway Company in, the transportation and shipping of freight, and especially live-stock, and in the making of contracts therefor from said station of Strawn.

That a few days prior to the said 22nd day of April, A. D., 1902, the plaintiffs notified the said agent of the defendant Company at said Strawn that they desired to ship the cattle hereinafter named to Tulsa, I. T. and for him to have a sufficient number of cars ready on said date so that the said cattle would not be delayed at Strawn. That plaintiffs prior to that time had made arrangements with the St. Louis & San Francisco Railway Company to have said cattle shipped from Strawn, Texas, to Fort Worth, and thence over the line of the Red River, Texas & Southern Railway Company and of the said St. Louis & San Francisco Railway Company to said Tulsa, I. T., which would be the shortest and most direct route from the said Strawn to said Tulsa.

That on the day and year aforesaid at the station of said railway Company, in the town of Strawn, in the county of Palo Pinto, said State, plaintiffs tendered and delivered to the defendant J. M. Tucker, for said defendant Company, six hundred and fifteen (615) head of stock cattle and ninety seven (97) head of calves, of the total value of twelve thousand Eight hundred and eighty dollars, ($12,880.00) to be transported and shipped in the most expeditious manner and over the shortest and most direct route from the said station of Strawn to the Station of Tulsa in the Indian Territory; that the said J. M. Tucker, as agent for said defendant company, then and there, agreed to accept the said cattle, and did accept same, for the purpose of transporting them, as a common carrier for hire, from the
3 said Strawn to said Tulsa, at the request of the said plaintiffs, and agreed to transport the said cattle, safely and securely, from the said Strawn, Texas, to said Tulsa, I. T. with reasonable diligence and speed, and, as plaintiffs supposed, by the shortest and most direct route.

That on the said day, after all said cattle had been about loaded on the cars, the said agent of the said plaintiffs & S. W. Eastin, one of the plaintiffs, was notified and requested by said defendant J. M. Tucker, as agent aforesaid to sign the Bill of Lading, termed, these plaintiffs believe a live-stock contract, which billed or routed these cattle for shipment over the line of defendant Company to Paris, Texas, and from thence over the line of Railroad of the St. Louis & San Francisco Railway Company to Monette, Mo., and from said Monette in a southwesterly course down to Tulsa, I. T. That said agent of plaintiffs & said Eastin objected to said cattle being billed or routed for shipment according to the provisions of said bill of lading and insisted that the said cattle should be taken either to Fort Worth or to Sherman and there delivered to the Red River, Texas & Southern Railway Company which connects with the St. Louis & San Francisco Railway Company at or near the North Boundary line of the State of Texas, but the said agent of defendant Company flatly and absolutely refused so to bill and route the said cattle for shipment over said lines, and told the agent of plaintiffs that the said cattle would not be shipped to Tulsa in any other way than the way they had them billed, and that they had to be shipped in that way or not at all.

That said cattle were stock cattle, as before alleged, and at said

time of year were not in a very good condition to be driven around through the country, and while they were in the usual and ordinary condition of stock cattle in said section of the country, they were not in such a condition as to stand to be driven around or hauled about unnecessarily for such a great length of time and handled
4 unnecessarily as they were, as is hereinafter alleged. That of these facts the said agent of the defendant Company was notified, and he also knew that the plaintiffs could not unload the said cattle and drive them back to the pastures. That as a matter of fact, the plaintiffs, at that time, had no other pasture, as they had gone to great expense and leased a pasture in the said Indian Territory, near said Tulsa; and the said agent of defendant Company knew that the plaintiffs were compelled to ship said cattle on that date, and that they were not in a position to unload the said cattle or to take them to any other railroad for shipment. That when these plaintiffs demanded the cars for shipment of these cattle to Tulsa they were not notified that the cattle would be shipped over the route by which they were billed and finally transported, but supposed that the defendants would permit the said cattle to be shipped and routed over the shortest and most direct route or line and in that manner that would be the quickest and most expeditious for their transportation, as the law required of them to do. That had they been aware of the fact that said cattle were to be transported via Paris, Texas, and Monette, Mo. they would not have permitted the said cattle to be driven to said Strawn for shipment on that day.

That, while the said agent of plaintiffs signed the said Bill of Lading or live stock contract, he did so under compulsion and duress, and after said cattle had been received for shipment by said agent for defendant company, as aforesaid, and protested to the signing of same as well as to the cattle being billed, routed and shipped in that manner; and that said instrument was not signed and was not presented to plaintiffs to be signed, until after the defendants had received all of said cattle in their stock pens for shipment, as aforesaid.

That defendant Company's railroad does not run to the said Tulsa, but connects with the railroad of the Red River, Texas &
5 Southern Railway Company both in the city of Forth Worth and in the city of Sherman, in said state of Texas, which said Red River, Texas & Southern Railway connects with the line of the St. Louis & San Francisco Railway Company at or near the North Boundary line of the State of Texas, and that the said St. Louis & San Francisco railroad extends from thence to said Tulsa, in the Indian Territory; that this is the shortest and most direct route from the said Strawn Texas, to said Tulsa, I. T. That the said defendant could have either delivered the said cattle to said Red River, Texas & Southern Railway Company at Fort Worth, Texas, or at Sherman, Texas, as requested by plaintiffs and had them transported over the railroads aforesaid to said Tulsa, I. T. and that said plaintiff & plaintiffs' agent urged and insisted that the said cattle be billed and routed for shipment over said lines; but instead of billing and routing said cattle, and having them transported to said Tulsa, by making connection with said road either at Fort Worth or Sherman,

as aforesaid, they carried the said cattle through the said cities and from thence on to the city of Paris, in said State, where they delivered them to a line of the said St. Louis & San Francisco Railway Company to be from thence transported to said Tulsa. That the said cattle in order to be carried from the said Paris to said Tulsa, had to be transported, and were transported, up to the town of Monett, in the State of Missouri, and from said Monett in a Southwesterly course down to Tulsa, I. T. That this route was a very indirect one, and was some 289 & 9/10 miles longer and farther than from the said Fort Worth via said Sherman to said Tulsa, over the line of the Red River, Texas & Southern Railway Company, and the St. Louis & San Francisco Company, and 296 miles longer and farther than from the said Fort Worth, over the Texas & Pacific Railway to Sherman and over the St. Louis & San Francisco Railway to said Tulsa. That the most direct, shortest, and most expeditious line or route
6 for said cattle to have been transported from said Strawn to said Tulsa, was from the said Fort Worth over the Red River, Texas & Southern Railway and the St. Louis & San Francisco railway to said Tulsa, which was only 301 miles from Fort Worth or thereabout.

That the defendant Company, or said defendant J. M. Tucker, as its agent, would not transport and ship the said cattle unless the said Bill of Lading or live stock contract was signed by the plaintiffs, and represented to the plaintiffs and their said agent that the defendant Company's line did not connect with the Red River, Texas & Southern Railway Company's line at Fort Worth, and that he could not route, bill and transport said cattle to Fort Worth and there deliver them to the said Red River, Texas & Southern Railway Company for transportation to said Tulsa. That said statements were false and untrue and were made solely for the purpose of compelling these plaintiffs to have their said cattle shipped and routed, billed and transported, over the defendant Company'- line from said Strawn to said Paris, Texas, in order that the said defendant Company might receive more of the freight charges for the transportation of said cattle. That plaintiffs believe and aver that he, said Tucker, was following some secret agreement or instruction from some of the officials of defendant Company regarding the shipment of freight, especially live-stock, to the effect that all the freight which the said defendant Tucker should receive should be billed, routed and shipped, that as much of the transportation of said cattle to any point should be made over the defendant company's line as possible, regardless of the interest of the shippers or of what the expense and cost might be to them. Plaintiffs aver that when the said live stock were shipped, as aforesaid the said defendant Tucker had no regard whatever for the interest of these plaintiffs but that he billed and routed the said cattle with a total disregard of what expense and cost it would
7 be to these plaintiffs or the consequences that would result to the said cattle by their being transported in such a long, indirect and circuitous manner; that he totally and recklessly disregarded the duty that he, as the agent of said defendant Company, as a common carrier, owed to the plaintiffs to receive and transport the

said cattle in the most direct and practicable route and manner and in the least expensive way. That he also recklessly ignored the duty that the defendant Company owed to these plaintiffs as a common carrier in the transportation of said cattle over the lines and in the manner aforesaid. That he showed a total indifference to the rights and interest of plaintiffs in the shipment, routing and transportation of said cattle, and that he was controlled entirely by what he thought was to the interest of the company and as to the amount of freight the said defendant company would receive out of the shipment and transportation of said cattle.

That the carrying of the said cattle, and shipping them, to said Tulsa, over the said St. Louis & San Francisco railroad via Monett was also a much longer and indirect route than from the said Strawn via Fort Worth and from thence up the said defendant Company's line of railroad via Sherman, and from thence over the St. Louis & San Francisco railroad to said Tulsa.

That had the said cattle been transported from said Strawn to Fort Worth and there delivered to the Red River, Texas & Southern Railway Company and thence via Sherman over the St. Louis & San Francisco Railway Company, they could have been transported in about fifteen hours, or less time.

That by reason of the shipment of the said cattle in the manner aforesaid, the said cattle had to be unloaded at Paris, Texas, and reloaded on cars belonging to the said St. Louis & San Francisco Railway Company. That the stock pens where the said cattle
8 were unloaded were muddy and in a very bad condition and that many of the cows bogged down in the mud and all were much worried, weakened, enfeebled and damaged, by being bogged in said mud; that by reason of said mud the cattle would not eat and drink and, in fact, it was impossible for most of said cattle to reach the water and feed troughs, and, in this way, they were compelled to do without feed and water. That one of said cows, by reason of said bogging down, was so enfeebled that she was not able to walk and had to be carried and placed in the car. That from the effects of bogging down in the mud the said cow died along the way and was carried out and thrown off the car. That the market value of this cow was $20.00.

That also by reason of the said cattle being transported via. Paris as aforesaid, the said plaintiffs were compelled to expend the sum of fifty four dollars, ($54.00) for the feeding of said cattle at said Paris. That this feeding would have been entirely unnecessary had the said cattle been shipped over the shortest, most direct and expeditious route, via Fort Worth and Sherman, as aforesaid, and the cattle would not have had to have been unloaded and fed and the said expense would not have been incurred. That the feeding of said cattle was merely a waste of feed and money paid therefor, as said cattle did not eat the same by reason of the muddy condition of said pens as aforesaid.

That when the said cattle reached Catoos, the station just before Tulsa, they were detained for a period of fifteen hours, and during said delay said cattle had to do without any food or water. That

while said cattle were being delayed at said Catoos they were side-tracked but were not allowed to remain still but were constantly switched backward and forward in such a manner that they were jolted and jostled together until the great majority of them
9 were knocked down on the floor of the cars and the other cattle trampled upon them. That said cattle, by reason of said cars switching backward and forward, and jolting and jostling, were much bruised and skinned by knocking their horns against each other, and were very much weakened; and that nearly all the strength of said cattle was lost so that when they reached said Tulsa they were in a very poor, feeble and bruised condition and were scarcely able to leave the cars and stand upon their feet after they were removed therefrom.

That it took sixty (60) hours to transport said cattle from Strawn via Paris and Monett, to said Tulsa, including the said delay at said Catoos. That this delay was needless and unnecessary. That it was an act of gross negligence for said cattle to be transported in the manner aforesaid; and that while they were being transported from the said Paris to said Tulsa they were compelled to do without any food or water.

That by the carrying of said cattle around in this long circuitous route and their having to be unloaded in said muddy and boggy pens at Paris, Texas, and side-tracked and delayed so long at Catoos, the said cattle were so wrought upon and became so thin and feeble and weak that they could hardly stand up, and many of them fell down on the floor of the cars and were trampled on by the other cattle. That they were jostled backward and forward against the cars until they became severely hurt and bruised and sore, their hair was knocked off, their bodies skinned, and they were covered on different parts of their bodies with bloody sores arising from the said knocks and jolts. That many of said cattle, through weakness resulting from their long detention in said cars, without food and water, fell down in the cars and were trampled upon by the other cattle, and were horned and hooked by them, and were severely injured and damaged, which resulted in the death of many of them, as hereafter stated.

10 That when the said cattle reached Tulsa they were so bruised, wounded, and worn out, and enfeebled, by being thus hauled in this long and circuitous route and switched about and by being confined in the cars so long without food and water, they were so weak and feeble they could hardly stand up. That they had to be unloaded at said Tulsa and held there and watered and kept on the grass until they could get strength enough to be removed to the pastures of the plaintiff about ten miles from said Tulsa.

That when the said cattle reached Tulsa and were unloaded many of them were found dead in the cars and many others died shortly after being unloaded, amounting to the number of forty (40) head which died and were lost in this manner, all of which was caused by, and resulted from, the manner in which the said cattle had been transported from said Strawn, via Paris, and Monett, to said Tulsa, and by their being jostled about and trampled upon in said cars,

and detained therein for so long a time, and having to do without feed and water during their said transportation. That the reasonable market value of said forty (40) head of cattle per head was $20.00 at said Tulsa.

That by reason of the said cattle having to be detained at said Tulsa for the purpose of allowing them to rest and be fed so that they could recuperate and gain sufficient strength to be removed to said pastures, the said plaintiffs were compelled to pay for pasturage at said place, which pasturage cost these plaintiffs about $30.00, which was a reasonable and fair price to pay for same.

That the plaintiffs, by reason of said detention at Tulsa, were compelled to pay the expenses of hands at Tulsa, in boarding them, the sum of $11.40; and to buy feed for the horses which were used in attending to said cattle at said place the sum of $6.50; and were also compelled to pay a livery bill of the sum of $2.50, and the
11 sum of $29.50 for hire of the hands attending to said cattle at said Tulsa, and the sum of $6.50 for the hire of a horse which plaintiffs had to hire to attend to said cattle. That the above expenditures at said Tulsa were reasonable and were necessarily incurred by the said plaintiffs for the care and protection of said cattle at said place.

That there were in said lot of cattle that were so shipped from said station at Strawn, Texas, to said Tulsa, I. T., about five hundred and fifty head of cows, and that about all of said cows were with calves; and that by reason of said rough treatment of said cattle in their transportation, as aforesaid, nearly all of said cows, that is to say about 362 head thereof, lost or dropped their calves out of season and in a short while after they reached said Tulsa. That the losing of said calves was solely from their rough treatment aforesaid, and was a total loss to plaintiffs and by reason thereof, plaintiffs were damaged in the sum of Twenty One Hundred and seventy two and no/100 dollars, ($2172.00). That said cows, by loss of their calves, were depreciated in their market value at said Tulsa in said amount.

That after said cattle were removed to the pastures of plaintiff, being in such a weak and feeble condition, they became diseased and it took them a long while to recuperate and recover their health and strength and flesh so that they could be placed on the market or sold at all. That, as a matter of fact, the said cattle never did recuperate as they should have done in order to be placed on the market or even sold. That said cattle by reason of the premises, were damaged and depreciated in their market value at said Tulsa, in the sum of not less than six dollars ($6.00) per head.

Plaintiffs aver that by the transportation of said cattle from the said Strawn, via Paris and Monett, they were compelled to pay more money for freight charges for the carriage of said cattle on that route than they would have had to pay, had the said cattle
12 been shipped direct from the said Strawn to Fort Worth, and from Fort Worth over the lines of the Red River, Texas & Southern Railway Company and the St. Louis & San Francisco Railway Company; that they were compelled to pay, and did pay, the sum of $1035.00 for the transportation of said cattle in the manner

they were transported, but had they been transported from said Strawn via Fort Worth and over the lines of the Red River, Texas & Southern Railway Company and the St. Louis & San Francisco Railway Company, they would have only had to pay the sum of $952.20.

That plaintiffs are entitled to recover against the defendants the sum of $82.80 the same being the amount which plaintiffs were compelled to pay for freight more than they should have paid had the said cattle been transported as they should have been, via Fort Worth and Sherman over said lines to said Tulsa. Wherefore plaintiffs allege that by reason of the premises they have been damaged in the sum of eight thousand dollars ($8,000.00).

Wherefore plaintiffs pray that defendants be cited to appear and answer herein, that on final trial hereof they have judgment against said defendants for the amount of their damages, interest, and all costs of suit, and for general and special relief.

THOS. D. SPORER,
Attorneys for Plaintiffs.

Endorsed: No. 3985. Eastin & Knox *vs.* J. M. Tucker, *et al.* Plaintiff's Original petition. Filed Feb. 4, 1904. A. C. R. Morgan, Dist. Clerk.

Original Answer of Def't Tucker.

Filed April 1, 1904.

In the Dist. Court of Parker County, Tex.

S. W. EASTIN & D. L. KNOX
vs.
THE TEXAS & PACIFIC RY. CO. ET AL.

In this case the defendant J. M. Tucker for answer says
13 he excepts generally to Plf's. petition & says the same does not state a cause of action against him, upon which he prays judgment.

For further answer he denies each and every averment of Pl'f's petition, and says the same are not true in fact.

Having fully answered, &c.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Attorneys for Def't J. M. Tucker.

Endorsed: No. 3985. Eastin & Knox, *vs.* T. & P. Ry. Co. *et al.* Original Answer of J. M. Tucker. Filed Apl. 1, 1904. A. C. R. Morgan, Clk. By M. V. Kinnison, Deputy.

Original Answer of T. & P. Ry. Co.

Filed Apr'l —, '04.

In the District Court of Parker County, Texas.

EASTIN & KNOX
vs.
THE TEXAS & PACIFIC RY. CO. ET AL.

In this case the defendant the Tex. & Pac. Ry. Co. comes & for answer says, It denies each and every averment of Pl'f's petition, and says the same are not true, Having answered, &c.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'ys for Def. T. & P. Ry. Co.

Endorsed: No. 3985. Eastin & Knox *vs.* The T. & P. Ry. Co. *et al.* Orgl. Answer of T. & P. Ry. Co. Filed Apl. 1, 1904, A. C. R. Morgan, Clk. Per M. V. Kinnison, Dept.

14 *Petition for Removal to U. S. Court.*

Filed April 1, 1904.

In the District Court of Parker County, Texas, A. D. 1904.

S. W. EASTIN and D. S. KNOX
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY and J. M. TUCKER.

Petition for Removal.

The petition of the Texas & Pacific Railway Company respectfully shows to the Court:

First. That the Texas & Pacific Railway Company was at the time this suit was filed against it, and now is, a corporation duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act Entitled an act to incorporate the Texas & Pacific Railroad Company and to aid in the construction of its road and for other purposes;" approved March 3, 1871, and acts amendatory thereof and supplemental thereto including an act approved May 2, 1872, whereby, among other things, the name, style and title of the said Texas & Pacific Railroad Company was changed to "The Texas & Pacific Railway Company."

Second. The above entitled action was commenced in the above named Court on the 4th day of February, 1904, and citation issuing thereon, was served upon this defendant on the 5th day of Feb., 1904, which citation is returnable on the first Monday in April,

1904, it being the 4th day of April, 1904, and this defendant is not and will not be required by the laws of the State of Texas, or the rules of this Court, to answer or plead to the petition of plaintiffs before the 5th day of April, 1904.

Third. The matter and amount in dispute in this case exceeds, exclusive of interest and costs, the sum or value of Two Thou-
15 sand Dollars, and this suit arises under the laws of the United States, as hereinbefore and hereinafter is more fully set forth. This action against your petitioner, The Texas & Pacific Railway Company, and J. M. Tucker, its local agent at Strawn, Texas, is for damages to cattle shipped by plaintiffs from Strawn, Texas, by them over The Texas & Pacific Railway's line destined to Tulsa in the Indian Territory. That defendant misrouted them and sent them over a much longer route than plaintiffs desired them to go, and by delays and misuse of the cattle injured them.

This petitioner says that plaintiffs aver that J. M. Tucker, in shipping the cattle, acted for and was the agent of The Texas & Pacific Railway Company. This petitioner says that the said Tucker was its local station agent and acted for it as agent, and not in any other capacity, and was not and is not a proper party to this suit. The plaintiffs do not, in their petition, state any cause of action against him. They improperly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, The Texas & Pacific Railway Company, from removing this case to the United States Circuit Court, which said joinder of said J. M. Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this defendant, The Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled "An act to incorporate The Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

16 Fourth. That the above entitled action is a civil suit arising under the laws of the United States of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by act of Congress, approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes,' and the acts of Congress approved August 13, 1888, entitled "An Act to correct the enrollment of an act approved March 3, 1887, entitled 'An Act to amend sections 1, 2, 3, and 10, of an act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the

removal of causes from the State Courts and for other purposes,' approved March 3, 1875."

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the Circuit Court of the United States for the Northern District of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said Court to accept said petition and bond, and to remove this cause to the Circuit Court of the United States for the Northern District of Texas, and for such other relief in the premises as may be just and equitable.

J. M. Tucker, who is joined with the Texas & Pacific Railway Company as defendant in this case, says that he is, and when this suit was begun, was a citizen of Palo Pinto County, Texas; that so far as applicable to him, he adopts the statements of this petition made by the Texas & Pacific Railway Company, and joins it in this petition and bond for removal of this case to the United
17 States Circuit Court for the Northern District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By B. G. BIDWELL &
H. C. SHROPSHIRE,
Its Attorneys.

J. M. TUCKER,
By B. G. BIDWELL &
H. C. SHROPSHIRE,
His Attorneys.

STATE OF TEXAS, *County of Parker:*

On this day personally appeared before me, the undersigned authority, B. G. Bidwell, who after being by me first duly sworn, says he is the attorney for the defendants in this case; that the statements of the foregoing petition are true.

Witness my hand and seal of office this 31st. day of March, 1904.

[SEAL.] H. C. SHROPSHIRE,
Notary Public, Parker County, Texas.

Endorsed: No. 3985. S. W. Eastin & D. L. Knox *vs.* The Texas & Pacific Railway Company and J. M. Tucker. Defendants' Petition for removal of this case to the United States Circuit Court for the Northern District of Texas, at Fort Worth. Filed April 1, 1904. A. C. R. Morgan, Clerk Dist. Court. By M. V. Kinnison, deputy. B. G. Bidwell, & H. C. Shropshire, Attorneys for Defendants, The Texas & Pacific Railway Company and J. M. Tucker.

Bond for Removal.

Filed April 1st, 1904.

In the District Court of Parker County, Texas, Judicial District.

No. 3985.

S. W. EASTIN ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY ET AL.

Know all men by these presents, That the Texas and Pacific Railway Company & J. M. Tucker, as principals, and Edw. O. Tenison and C. R. Buddy as sureties are held and firmly bound unto
18 S. W. Eastin & D. L. Knox in the penal sum of Five Hundred Dollars, for the payment whereof, well and truly to be made, unto the said S. W. Eastin & D. L. Knox, their heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that,

Whereas, the said, The Texas and Pacific Railway Company & J. M. Tucker have filed their petition in the District Court of Parker County, Tex. for the removal of a certain cause therein pending, wherein S. W. Eastin & D. L. Knox are plaintiffs, and The Texas and Pacific Railway Company & J. M. Tucker are defendants, said cause being numbered upon the docket of said Court as No. 3985, to the Circuit Court of the United States for the Northern District of Texas.

Now, therefore, if the said The Texas and Pacific Railway Company & J. M. Tucker shall enter in said Circuit Court of the United States for the Northern District of Texas, a copy of the record in said suit on the first day of the next session thereof, and shall pay all costs which may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seal this 30th. day of March, 1904.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By B. G. BIDWELL, *its Att'y.*
J. M. TUCKER,
EDW. O. TENNISON,
C. R. BUDDY.

Approved April 5th, 1904.

J. W. PATTERSON,
Judge District Court, 43 Judicial District.

Endorsed: No. 3985. Eastin & Knox *vs.* The Texas & Pacific Railway Co. *et al.* Bond for Removal. Filed the 1st. day of April,
19 A. D., 1904. A. C. R. Morgan, Clerk District Court, Parker County, Texas. Per M. V. Kinnison, Deputy.

1st. Supplemental Petition Resisting Removal of Case.

Filed April 5, 1904.

In the District Court, Parker County, Texas, April Term, A. D. 1904.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Now comes plaintiffs, and leave of the Court being first had, files this his 1st. supplemental petition, and excepts to the defendants' petition to remove this cause to the United States Circuit Court for the Northern District of Texas at Fort Worth, and say, 1st. That said petition is insufficient to remove said cause.

2nd. And specially excepting plaintiffs say that the record in this cause, and plaintiffs complaint in his original petition herein show that plaintiffs have sued jointly the deft. T. & P. Ry. Co. & J. M. Tucker for a wrongful shipping, routing, billing and conveyance of live stock therein described; that said cause of action is joined, and not separate, against both of said defendants; and that deft. J. M. Tucker is resident of Palo Pinto County in said State.

3rd. The record of this cause & plaintiff's complaint or cause of action contained in his original petition filed herein on Feby. 4, 1904, show that there is no separable controversy existing between these plaintiffs and the deft. Company, The Texas and Pacific Railway Company; that the cause of action of these plaintiffs is a joint cause of action against both said defendants, the said T. & P. Ry. Co. & said J. M. Tucker, who is a resident of said Palo Pinto County.

Wherefore plaintiffs pray the judgment of the Court and that said cause be not removed to said the Circuit Court of the United
20 States for the Northern District of Texas at Fort Worth, & that this cause be retained and tried by and in this Court, & for costs of this procedure &c.

THOS. D. SPORER,
Att'y for Plaintiffs, Eastin & Knox.

And further answer said defendants petition for removal of this cause into said Circuit Court of the United States for the Northern District of Texas, the said plaintiffs deny all and singular the allegations in said defendants' petition for removal filed herein on April 1st, 1904, and of this they put themselves upon the country. Wherefore they pray judgment of this Court &c.

THOS. D. SPORER,
Att'y for Plaintiffs, Eastin & Knox.

And especially answering said petition for removal of the said defendants, the said plaintiffs come and say that they deny, each, every and all of the allegations in said defendants' petition to remove said cause to said Circuit Court as aforesaid; that it is untrue, as alleged therein, that these plaintiffs joined and sued the said J. M. Tucker in this cause with said T. & P. Ry. Co. defendant wrongfully, improperly and fraudulently, and for the sole and only purpose of preventing said petitioner, The Texas and Pacific Railway Company, from removing this cause to the United States Circuit Court aforesaid; and they further deny that the joinder of said J. M. Tucker with the said T. & P. Ry. Co. as a co-defendant, was done fraudulently, and was and is a fraud on the jurisdiction of said The Circuit Court of the United States for the Northern District of Texas.

These plaintiffs further say and aver that they allege in their original petition, to-wit: "That the defendant Company, or said defendant J. M. Tucker, as its agent, would not transport & ship the said cattle unless Bill of lading or live-stock contract was signed by the plaintiffs, & Represented to plaintiffs & their said agent that the def't Company's line did not connect with the Red River,
21 Texas & Southern Ry.'s Company's line at Ft. Worth; & that he could not route, bill & transport said cattle to Ft. Worth & then deliver them to said Red River & Southern Ry. Co. for transportation to said Tulsa; that said statements were false & untrue & were made solely for the purpose of compelling these plaintiffs to have their said cattle shipped & routed billed & transported over the def'ts Co.'s line from Strawn to said Paris, Texas in order that said def't Co. might receive more of the freight charges for the transportation of said cattle. That plaintiffs believe & aver that he, said Tucker, was following some secret agreement or instruction from some of the officials of said def't Co. regarding the shipment of freight, especially live-stock, to the effect that all the freight which said def't Tucker should receive should be so billed, routed & shipped, that as much of the transportation of said cattle to any point should be made on the def't Co.'s line as possible, regardless of the interest of the shipper, or of what the *express* & Costs might be to them. Plaintiffs aver that when said live-stock were shipped as aforesaid, the said def't Tucker had no regard whatever for the interest of these plaintiffs; but that he billed & routed said cattle with a total disregard of what expense & cost it would be to these plaintiffs, or the consequences that would result to said cattle by their being transported in such a long, indirect & circuitous manner. That he totally & recklessly disregarded the duty that he as the agent of said def't Co. as a common carrier owed to the plaintiffs to receive & transport said cattle in the most direct & practicable route & manner & in the least expensive way. That he also recklessly ignored the duty that the def't Co. owed to these plaintiffs as a common carrier in the transportation of said cattle over the lines & in the manner aforesaid; that he showed a total indifference to the rights & interest of plaintiffs in the shipment, routing & transporta-

tion of said cattle, and that he was controlled entirely by
22 what he thought was to the interest of the Company & as to the amount of freight the said def't Co. would receive out of the shipment & transportation of said cattle.

Said plaintiffs' petition further shows that all the damage that occurred to said cattle was due solely to the routing, billing & transportation of said cattle by said Tucker, in the long, indirect & circuitous route & manner as alleged by plaintiffs, and that they were greatly damaged. That all said allegations were made by said plaintiffs in good faith, & that plaintiffs believed them to be true, & that they are true so far as these plaintiffs know and believe. That they are not fraudulent & are not made to perpetrate a fraud on the jurisdiction of said Circuit Court.

That these allegations plaintiffs are ready to verify.

Wherefore plaintiffs pray that this cause be not removed to the said Circuit Court, but that this Court retain same for trial herein, and said petition for removal be not granted & for costs & general relief.

THOS. D. SPORER,
Att'y for Eastin & Knox, Plaintiffs.

Now comes D. L. Knox, one of the plaintiffs in the above numbered & entitled cause, who being first duly sworn on his oath doth say that he believes that all the above & foregoing allegations are true.

(Signed) D. L. KNOX.

Sworn to and subscribed before me this the 5th. day of April, 1904.

A. C. R. MORGAN, [SEAL.]
Dist. Clerk, Parker Co., Tex.

Endorsed: No. 3985. Eastin & Knox *vs.* J. M. Tucker, *et al.* Plaintiffs' 1st. Supplemental Petition Resisting Def'ts'. Petition to Remove to U. S. Circuit Court. Filed April 5, 1904. A. C. R. Morgan, Dist. Clerk.

Judgment Refus- Petition to Remove Case.

April 5, 1904.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER and THE TEXAS & PACIFIC RAILWAY CO.

APRIL 5, 1904.

This day this cause was called and both parties appeared
23 by attorney, and then came on to be heard the defendants' petition for removal of this cause to the United States Cir-

cuit Court for the Northern District of Texas at Fort Worth, which said petition and also a bond for removal of said case were filed in this Court on the first day of April, 1904, and in connection with said petition for removal also came on to be heard the plaintiffs' first supplemental petition resisting said petition. And the Court having heard and considered the same, and having heard the argument of counsel thereon, and being fully advised, is of the opinion that the law is against said petition. It is therefore considered and adjudged by the Court that said petition for the removal of this cause to the said United States Circuit Court be and the same is refused and in all things overruled; and this cause is set for the 21st. day of April, 1904, to be reset for the 9th. day of May, 1904, if it cannot be reached by April 22nd; to all of which the defendants except, and protest against this Court taking any further action in this case.

Bill of Exception to the Refusal of the Court to Remove Case.

Filed May 5, 1904.

In the District Court of Parker County, Texas, A. D. 1904.

EASTIN & KNOX
vs.
TEXAS & PACIFIC RY. CO. and J. M. TUCKER.

Be it remembered that the defendants The Texas & Pacific Railway Company and J. M. Tucker on the 5th. day of April, 1904, having previously filed in said Court and case their joint petition and joint bond for the removal of this case to the United States Circuit Court for the Northern District of Texas, did on said 5th. day of April, 1904; it being appearance day in said Court, present
24 their said petition and bond to this court and ask for the removal of this case to the United States Circuit Court as aforesaid; when the court refused to remove said case and denied a removal thereof and retained jurisdiction to hear the case; to which action of the Court the defendants excepted and protested against this Court entertaining jurisdiction to further hear this case; the petition for removal and the bond therefor, with date they were filed, are in the words and figures following:

In the District Court of Parker County, Texas, A. D. 1904.

S. W. EASTIN and D. S. KNOX
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY and J. M. TUCKER.

Petition for Removal.

The petition of the Texas & Pacific Railway Company respectfully shows to the court:

First. That the Texas & Pacific Railway Company was at the time

this suit was filed against it, and now is, a corporation duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act entitled An Act to incorporate the Texas & Pacific Railroad Company and to aid in the construction of its road and for other purposes;" approved March 3, 1871, and acts amendatory thereof and supplemental thereto including an act approved May 2, 1872, whereby among other things, the name, style and title of the said Texas & Pacific Company was changed to "The Texas & Pacific Railway Company."

Second. The above entitled action was commenced in the above named court on the 4th. day of February, 1904, and citation issuing thereon, was served upon this defendant on the 5th. day of February, 1904, which citation is returnable on the first Monday in April, 1904, it being the 4th. day of April, 1904, and this defendant is not and will not be required by the laws of the State of Texas, or the rules of this court, to answer or plead to the petition of plaintiffs before the 5th. day of April, 1904.

25 Third. The matter and amount in dispute in this case exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars, and this suit arises under the laws of the United States, as hereinbefore and hereinafter is more fully set forth. This action against your petitioner, The Texas & Pacific Railway Company, and J. M. Tucker, its local agent at Strawn, Texas, is for damages to cattle shipped by plaintiffs from Strawn, Texas by them over the Texas & Pacific Railway's line destined to Tulsa in the Indian Territory. That defendant misrouted them and sent them over a much longer route than plaintiffs desired them to go, and by delays and misuse of the cattle injured them.

This petitioner says that plaintiffs aver that J. M. Tucker, in shipping the cattle, acted for and was the agent of the Texas & Pacific Railway Company. This petitioner says that the said Tucker was its local station agent and acted for it as agent, and not in any other capacity, and was not and is not a proper party to this suit. The plaintiffs do not, in their petition, state any cause of action against him. They improperly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, The Texas & Pacific Railway Company, from removing this case to the United States Circuit Court, which said joinder of said J. M. Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this defendant, The Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the Charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas &

26 Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above entitled action is a civil suit arising under the laws of the United States of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes,' and the Acts of Congress approved August 13, 1888, entitled "An Act to correct the enrollment of an Act approved March 3, 1887, entitled 'an Act to amend sections 1, 2, 3, and 10, of an Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the State Courts and for other purposes,' approved March 3, 1875."

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the Circuit Court of the United States for the Northern District of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said Court to accept said petition and bond, and to remove this cause to the Circuit Court of the United States for the Northern District of Texas, and for such other relief in the premises as may be just and equitable.

J. M. Tucker, who is joined with the Texas & Pacific Railway Company as a defendant in this case, says that he is, and when this suit was begun, was a citizen of Palo Pinto County, Texas;
27 that so far as applicable to him, he adopts the statements of this petition made by the Texas & Pacific Railway Company, and joins it in this petition and bond for removal of this case to the United States Circuit Court for the Northern District of Texas.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
By B. G. BIDWELL &
H. C. SHROPSHIRE, *Its Attorneys.*
J. M. TUCKER,
By B. G. BIDWELL &
H. C. SHROPSHIRE, *His Attorneys.*

THE STATE OF TEXAS, *County of Parker:*

On this day personally appeared before me, the undersigned authority, B. G. Bidwell, who, after being by me first duly sworn, says he is the attorney for the defendants in this case; that the statements of the foregoing petition are true.

Witness my hand and seal of office, this 31st. day of March, 1904.

[SEAL.] (Signed) H. C. SHROPSHIRE,
Notary Public, Parker County, Texas.

Endorsed: "No. 3985; S. W. Eastin and D. L. Knox, *vs.* The Texas & Pacific Railway Company and J. M. Tucker; Defendants petition for Removal of this case to the United States Circuit Court for the Northern District of Texas at Ft. Worth. Filed April 1, 1904. A. C. R. Morgan, Clerk District Court. By M. V. Kinnison, Deputy. B. G. Bidwell, attorney for defendants, The Texas & Pacific Railway Company and J. M. Tucker.

In the District Court of Parker County, Texas.

No. 3985.

S. W. EASTIN ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY ET AL.

Know all men by these presents: That the Texas & Pacific Railway Company, and J. M. Tucker, as principals, and Edward O. Tennison and C. R. Buddy, as sureties, are held and firmly
28 bound unto S. W. Eastin and D. L. Knox in the penal sum of Five Hundred dollars, for the payment whereof, well and truly to be made, unto the said S. W. Eastin and D. L. Knox, their heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that

Whereas, the said The Texas & Pacific Railway Company and J. M. Tucker, have filed their petition in the District Court of Parker County, Texas, for the removal of a certain cause therein pending, wherein S. W. Eastin and D. L. Knox are plaintiffs, and the Texas & Pacific Railway Company and J. M. Tucker are defendants, said cause being numbered upon the docket of said Court as No. 3985, to the Circuit Court of the United States for the Northern District of Texas.

Now, therefore, if the said, The Texas & Pacific Railway Company, and J. M. Tucker, shall enter in said Circuit Court of the United States for the Northern District of Texas, a copy of the record in said suit on the first day of the next session thereof, and shall pay all costs which may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seals, this 30th day of March, 1904.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY.
By B. G. BIDWELL &
H. C. SHROPSHIRE, *Its Attorneys.*
J. M. TUCKER.
EDWARD O. TENNISON.
C. R. BUDDY.

Approved this April 5th, 1904.

J. W. PATTERSON,
Judge District Court, 43rd Judicial District.

Endorsed: No. 3985. Eastin & Knox *vs.* The Texas & Pacific Railway Company *et al.* Bond for removal. Filed the 1st day of April, A. D. 1904. A. C. R. Morgan, Clerk District Court, Parker County, Texas, per M. V. Kinnison, Deputy.

29 To all of which action by the court the defendants excepted in open court, and do now except, and ask that this bill of exception be signed and made a part of the record in this case; which is done.

J. W. PATTERSON,
Judge of 43rd District.

Endorsed: No. 3985. S. W. Eastin & D. L. Knox *vs.* The Texas & Pacific Railway Company and J. M. Tucker. Bill of exceptions No. 1, asked by defendants, The Texas & Pacific Railway Company and J. M. Tucker. Filed May 5, 1904. A. C. R. Morgan, Dist. Clerk. B. G. Bidwell & H. C. Shropshire, attorneys for T. & P. Ry. Co. and J. M. Tucker.

1st Amended Orig. Answer of the T. & P. Ry. Co.

Filed Apr. 7, 1904.

In the District Court of Parker County, Tex.

EASTIN & KNOX
vs.
THE TEX. & PAC. RY. CO. ET AL.

Now comes the Texas and Pacific Railway Company, and protesting against the right of this Court to hear & determine this case, with leave of the Court files this its first amended original answer in lieu of its original answer filed herein on the — day of ——, 1904, and for answer says: It denies each and every averment of the plaintiff's petition, and says the same are not true in fact. It further says that plaintiffs' cattle in controversy were shipped by them on written contracts signed by Pl'ffs & def't. The Texas & Pacific Ry. Co. in which the cattle were shipped to Paris, Tex. They were not routed nor billed to or by Monett, Mo., but were at Paris delivered to the St. Louis and San Francisco Ry. Co. Said contract is dated Strawn, Tex. Ap'l 23rd, 1902. By its express terms this defendant
30 limited its liability to its own line of railway & is not to be liable for anything beyond its line, which end of its line was Paris, Tex. It is also provided in said contract that the pl'fs will feed, water, take care of the cattle when awaiting shipment, while being loaded, unloaded, reloaded or transported, &c. This defendant

says said cattle were not in its possession over 28 hours & there was no necessity to feed & water them. This defendant further says that plaintiffs wanted their cattle routed by Ft. Worth & Frisco route; he was notified that its agent had no authority to bill them that way, but could bill them on through billing by Sherman or Paris. Pl'fs then consented to bill them by Paris, and it was done. The Frisco Co. received them there & routed them to destination, but could have sent them to Tulsa by a nearer way than by Monett, had it desired it. The def't makes the contracts above referred a part hereof, marked "A." This def't says it carried & delivered the cattle to Paris, Tex. safely & carefully on reasonable time. The defendant further says that the St. Louis & San Francisco Ry. Co. is duly incorporated and operates its line of railway in Lamar County, Tex. & has a local agent at Paris, Tex. to-wit C. Griffith. The most of the damage complained of by the plaintiff occurred on its line of railway. The def't the Tex. & Pac. Ry. Co. asks that it be made a party def't herein & asks that citation be served on it & that it be required to answer in this case, and on trial that if pl'f should recover against this def't it have judg't over against said Ry. Co. for all such damages as were caused by it.

Having answered, it asks to be dismissed with its costs.

B. G. BIDWELL &
H. C. SHROPSHIRE,
Att'ys for Def't T. & P. Ry. Co.

Endorsed: No. 3985. Eastin & Knox *vs.* The Tex. & Pac. Ry. Co. *et al.* First Am'd Or'g'l Ans. of the T. & P. Ry. Co. Filed April 7, 1904. A. C. R. Morgan, Dist. Clerk.

31 *2nd Amended Orig. Answer of The T. & P. Ry. Co.*

Filed Nov. 9, 1904.

In the District Court of Parker County, Texas, 1904.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Now comes the Texas & Pacific Railway Company, defendant in the above styled and numberd cause, and still protesting against the right of this Court to hear and determine this case, and with leave of the Court therefor first obtained, files this its second amended original answer in lieu of its first amended original answer filed herein on the 7th day of April, 1904, and for separate answer in this behalf says:

1. This defendant denies each and singular the allegations in plaintiffs' petition contained; says the same are not true in fact;

and of this it puts itself upon the country; and prays that plaintiffs take nothing by this suit and that it go hence without day and recover of plaintiffs its costs in this behalf expended, etc.

H. C. SHROPSHIRE,
Attorney for Defendant,
The Texas & Pacific Railway Company.

2. For further special and separate answer this defendant further says that if it carried and handled the cattle in controversy as alleged, said cattle were shipped on two certain live stock contracts bearing date Strawn, Texas, April 22, 1902, both of said contracts being signed "Eastin & Knox, by Eastin," the shippers and plaintiffs herein, and J. M. Tucker, agent for this defendant; that in each of said contracts it is stipulated and provided:

(*a*) That in consideration of the mutual covenants and conditions therein contained, and for other valuable considerations, this
32 defendant undertook and agreed to carry the cattle in controversy from Strawn, Texas, to Paris, Texas, there to be delivered to the next connecting carrier.

(*b*) That the live stock covered by said contracts were not to be transported within any specified time nor be delivered at destination at any particular hour, nor in time for any particular market.

(*c*) That plaintiffs agrees to assume, and does assume, all risk of injury or loss of said stock because of their being wild, unruly weak or maiming each other or themselves, or of heat, suffocation or other results of being crowded in the cars.

(*d*) That plaintiffs, at their own risk and expense were to take care of, feed, water and attend to said stock while the same were in the stock yards of this defendant or elsewhere, awaiting shipment, and while the same were being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and whe-ver the same were to be unloaded and reloaded for any purpose whatever, and that plaintiffs covenants and agrees to hold this defendant harmless on account of any loss or damage to said stock while being so in their charge and so cared for and attended to by them or their agents or employees.

(*e*) "It is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads of any other railroad company, this defendant shall be released from liability of every kind after said stock shall have left its road, and that plaintiffs hereby so expressly stipulates and agrees, it being distinctly understood that the Texas & Pacific Railway Company in respect to said stock, and under said contracts, is limited to its own line of railway and will cease, and its part of this contract be fully performed upon delivery of said cattle to its next connecting carrier of the stock mentioned in said contracts
33 and receipted for therein. The understanding of both parties to said contracts being that this defendant shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, excepting to protect the through rate of freight

named in said contracts, and that in no event shall one carrier become liable for the negligence of another carrier.

(*f*) That plaintiffs assumes and releases this defendant from risk, injury or loss which may be sustained by reason of overloading of cars, freight of animals or crowding one upon another, or any and all other causes, except the negligence of this defendant, and such negligence shall not be assumed, but shall be proven by plaintiffs; said contracts being marked exhibit "A" and "B" for the purpose of identification; hereto attached and made a part of this answer.

Wherefore this defendant says, that it did promptly and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, at the instance and request of Plaintiffs, within a reasonable time, and without injury or damage to said cattle, and that upon the arrival of said cattle at the said Paris, Texas, it did there, promptly and immediately, deliver said cattle, within a reasonable time, to the next connecting carrier, to-wit: St. Louis & San Francisco Railroad Company, without injury or damage to said cattle; that said cattle were not routed via Monette, Mo., nor billed to or routed that way, but were by this defendant carried and transported from Strawn, Texas, to Paris, Texas, as hereinabove stated, and there, by this defendant, delivered to the next connecting carrier, the St. Louis & San Francisco Railroad Company, as aforesaid; and upon the delivery of said cattle, by this defendant, to the said St. Louis & San Francisco Railroad Company, at Paris, Texas, as aforesaid, the liability of this defendant ceased, and this defendant did not become liable and is not liable to plaintiffs for any damage
34 or injuries to said cattle accruing after and subsequent to the delivery of said cattle, by this defendant, to the said St. Louis & San Francisco Railroad Company at Paris, Texas, as hereinabove stated; that this defendant's line of railroad does not extend or run beyond the said Paris, Texas, and that the said Paris, Texas, is the end or terminus of the line of this defendant's railroad. This defendant says said cattle were not in its possession over twenty-eight hours and there was no necessity to feed and water them while they were in its possession. It further says that when plaintiffs requested their cattle to be routed via this defendant's line to Ft. Worth, Texas, thence over the Red River, Texas & Southern Railway Company and of the St. Louis & San Francisco Railroad Company to Tulsa, I. T., they were notified and informed by the agent of this defendant J. M. Tucker, that said agent had no authority to give plaintiffs a through rate and bill said cattle over the route designated by plaintiffs but could give them a through rate by billing said cattle over this defendant's line via Sherman or Paris, Texas, whereupon plaintiffs insisted upon and then consented to bill said cattle by Paris, Texas and it was done.

This defendant further says that the cattle in controversy were very poor and weak and were not in proper condition and fit for transportation and shipment upon railroad trains and cars, and that the poor and weak and improper condition of said cattle, at the time of the shipment of the same as alleged, was the direct and proximate cause of the injuries and damage of which plaintiffs complain, and

but for the poor and weak and improper condition of said cattle the injuries and damage of which plaintiffs complain would not have occurred; and that plaintiffs were guilty of negligence in shipping said cattle in such poor and weak and improper condition and assumed the risk of all injury or loss or damage to said cattle because of their being poor and weak and in an improper condition
35 for shipment and transportation, and this defendant is not liable for any injury or damage to said cattle arising from such causes.

This defendant further says that plaintiffs, their agents and servants in charge of said cattle, failed and neglected to take proper care of and did not give said cattle the proper care and attention while the same were in the stock yards in this defendant, or elsewhere, awaiting shipment, and while the same were being loaded, transported, unloaded and reloaded at feeding and transfer points, in this: that while said cattle were confined in the cars of this defendant and in and upon the cars of its connecting carriers, plaintiffs, their agents and servants in charge of said cattle, failed and neglected to give said cattle that care and attention that was necessary to keep them upon their feet and to keep them from crowding one upon another and trampling one upon another; that while said cattle were confined in the stock pens at Paris, Texas, plaintiffs, their agents and servants failed and neglected to give said cattle the proper amount of feed and water, and at said point and place failed and neglected to properly and carefully unload and reload said cattle on and off the cars, by reason of all of which said cattle were injured and damaged, if any, which is not admitted, but here expressly denied, in the manner and as alleged by plaintiffs; that such acts and omission of duty in the premises, on the part of plaintiffs and their agents and servants in charge of said cattle, as is hereinabove in this paragraph of this answer stated, was and is negligence, and but for such contributory negligence on the part of plaintiffs, their agents, servants and employees in charge of said cattle the injuries and damages sustained by plaintiffs in the shipment of said cattle, if any, which is not admitted, but here expressly denied, would not have occurred, and this defendant is not liable therefor.

36 This defendant further says that it was the duty of plaintiffs to properly load and unload said cattle on and off the cars wherever the same were to be loaded, unloaded and reloaded for any purpose whatever, and that plaintiffs failed and neglected to properly load and reload said cattle upon the cars in which said cattle were carried and transported from Strawn, Texas, to Paris, Texas, and from Paris, Texas, to Tulsa, I. T., in this: that said cattle were composed of about 615 head of stock cattle and about 97 head of calves, and that said stock cattle were composed of stock of various ages and sizes, and that said stock cattle and calves were together loaded upon and into the cars of this defendant and its connecting carriers, in an indiscriminate manner without respect or regard being paid to the age, sex, condition or size of said cattle, and that by reason of such improper loading of said cattle the larger and stronger cattle were

permitted and did crowd upon and trample down and upon and over the smaller and weaker cattle confined in and upon said cars, whereby said cattle were injured and damages, if any, which is not admitted, but here expressly denied, in the manner alleged by plaintiffs, and but for the contributory negligence of plaintiffs, their agents, servants and employees in charge of said cattle in so negligently loading and reloading said cattle in and upon the cars without respect being paid to the age, size, sex and condition of said cattle, as hereinabove stated, the injuries and damages, if any, which is not admitted, but here expressly denied, of which plaintiffs complain would not have occurred; and this defendant is not liable for any injury or damage to said cattle arising from such improper and negligent loading and reloading of said cattle.

This defendant further says that at the time of the shipment of the said cattle in controversy from Strawn, Texas, to Tulsa, I. T., its line of railroad did not, and does not now, extend and run in
37 the direction of the said Tulsa, I. T., beyond Paris, Texas; that the said Paris, Texas, is the end and terminus of its railroad line running from Strawn, Texas, in the direction of the said Tulsa, I. T., and that it did not then own and operate any line of railroad running and extending beyond the said Paris, Texas, in the direction of the said Tulsa, I. T.; that the said Tulsa, I. T., is not located and was not located upon the line of this defendant's railroad, but is and was beyond the end and terminus of this defendant's line of railroad, and at the time of the shipment of said cattle this defendant did not have any contract, agreement, arrangement or understanding with the Red River, Texas & Southern Railway Company for the transportation of shipments of live stock or any other freight originating at points on the line of the Texas & Pacific Railway Company west of Ft. Worth, Texas, and destined for Tulsa, I. T., upon a through rate by way of the said Red River, Texas & Southern R'y Company from Ft. Worth, Texas; that at the time of the shipment in controversy this defendant did not have and was not authorized to make or bill such shipments of live stock or any other freight upon a through rate over the line of said Red River, Texas & Southern R'y Company from Ft. Worth, Texas; that at the time of the shipment of said cattle defendant's agent, J. M. Tucker, did not have authority and was not authorized to bill said cattle upon a through rate of freight by way of said Red River, Texas & Southern R'y Company's line of railroad from Ft. Worth, Texas; that at the time of the shipment of said cattle this defendant only had through billing arrangements with the St. Louis & San Francisco Railroad Company for the billing of such shipments upon a through rate by way of Sherman and Paris, Texas, and at said time this defendant was not authorized, and its agent, J. M. Tucker, did not have authority, to ship said cattle upon a through rate of freight from Strawn, Texas, to Tulsa, I. T., otherwise than by way of
38 this defendant's line of road to Sherman or Paris, Texas, thence by way of the St. Louis & San Francisco Railroad Company's lines to Tulsa, I. T.; that at the time said cattle were tendered to this defendant for shipment this defendant was ready and

willing and could and would have received said cattle for shipment and transportation from Strawn, Texas, to Ft. Worth, Texas, and this defendant at said times was ready and willing and could and would have carried and transported said cattle from Strawn, Texas, to Ft. Worth, Texas, there to be delivered to plaintiffs or any other person or persons, or railway company or railway companies, designated by them, for the local tariff rate applying to and charged for the transportation of such shipments over the line of its road between said points; but plaintiffs at said time failed and refused to accept or take advantage of the privilege to ship said cattle upon said local rate from the said Strawn, Texas, to Ft. Worth, Texas, there to be delivered to themselves or any other person or persons or railway company or companies that might be designated by them; that at the time said cattle were tendered to this defendant for shipment plaintiffs were notified and informed by this defendant's agent, J. M. Tucker, of each and all of the facts in this paragraph of this answer above stated; whereupon, plaintiffs insisted upon and consented to the billing of said cattle upon the through rate by way of Paris, Texas, and it was done. Wherefore, this defendant says it is not liable for any injury or damage, if any, which is not admitted, but expressly denied, plaintiffs might have sustained in the shipment of said cattle because of the routing thereof by way of Paris, Texas.

Having answered in full, this defendant prays that plaintiff take nothing by this suit, and that this defendant go hence without day, and recover its costs in this behalf expended.

H. C. SHROPSHIRE,
Attorney for Defendant, Texas & Pacific Railway Company.

39 (3) For further special and separate answer in this behalf this defendant says that if it handled and carried the said cattle in controversy from the said Strawn, Texas, to Paris, Texas, said cattle were shipped upon two certain live stock contracts, bearing date Strawn, Texas, April 22, 1902, both of said contracts being signed by Eastin & Knox, by Eastin, the shippers and plaintiff herein, and J. M. Tucker agent for this defendant; that in each of said contracts it is stipulated and provided that in consideration of the mutual covenants and conditions therein contained, and for other valuable considerations, this defendant undertook and agreed to carry the cattle in controversy from Strawn, Texas, to Paris, Texas, there to be delivered to the next connecting carrier. Wherefore this defendant says that it did carry said cattle from said Strawn, Texas, to the said Paris, Texas, within a reasonable time, and did there deliver said cattle to its next connecting carrier, the said St. Louis & San Francisco Railroad Company, within a reasonable time and without injury or damage to said cattle; that said cattle were delivered to its next connecting carrier, the said St. Louis & San Francisco Railroad Company, immediately upon their arrival at Paris, Texas; that said St. Louis & San Francisco Railroad Company is duly incorporated, and operates its line of railway, or a part thereof, in Lamar County, Texas, and has a local agent at Paris, Texas, to-wit: C. Griffith; that at the said Paris, Texas, the said St. Louis & San Francisco

Railroad Company then and there accepted said cattle, to be safely and securely carried and conveyed over its said road and its connecting lines of railroad from Paris, Texas, to Tulsa, I. T., with ordinary care and with reasonable diligence and speed, and to be safely and securely delivered to plaintiffs or their consignees at the said Tulsa, I. T. for a reasonable reward, paid or to be paid, on delivery thereof, as aforesaid, or for its pro rata or share of the through rate
40 made by this defendant; that the said St. Louis & San Francisco Railroad Company, wrongfully and negligently acting in the premises, did not deliver said cattle to plaintiffs or their consignees at the said Tulsa, I. T., or to anyone else, with ordinary diligence and speed, as it was in duty bound and obligated so to do, but neglected and refused so to do, and did not with ordinary care, or with reasonable diligence and speed, carry and convey said cattle from the said Paris, Texas, to the said Tulsa, I. T., said point of destination, but, on the contrary, so carelessly and negligently conducted itself in the premises that by and through its negligence, default and carelessness said cattle were delayed a long time beyond the usual and ordinary time of passage over said road, as follows, to-wit: about fifteen hours or more beyond the usual and ordinary time of passage over said road, by means whereof plaintiffs were subjected to great loss, damage and expense, in this, to-wit: that when the said cattle reached Catoos, the station just before Tulsa, they were detained for a period of fifteen hours, and during said delay said cattle had to be without any food or water; that while said cattle were being delayed at said Catoos they were side-tracked, but were not allowed to remain still, but were constantly switched backward and forward in such manner that they were jolted and jostled together until the great majority of them were knocked down on the floor of the car and the other cattle trampled on them; that said cattle by reason of said cars switching backward and forward and such jolting and jostling were much bruised and skinned by knocking their horns against each other, and were very much weakened, and that nearly all of the strength of said cattle was lost, so that when they reached said Tulsa they were in a very poor, feeble and bruised condition, and were scarcely able to leave the cars and stand upon their feet after they were removed therefrom; by reason whereof said cattle were injured and damaged in the manner and as alleged by plaintiffs. That upon receipt of said cattle it was the duty of the said St. Louis & San
41 Francisco Railroad Company to receive said cattle and unload the same in good and sufficient pens at Paris, Texas, but the said St. Louis & San Francisco Railroad Company did not receive and unload said cattle into good and sufficient pens, but, on the contrary, did receive and unload said cattle at the said Paris, Texas, into its own pens; that said stock pens where the said cattle were unloaded at the said Paris, Texas, were muddy and in very bad condition; that many of the said cows bogged down in the mud, and all were much worried, weakened, enfeebled and damaged by being bogged in said mud; that by reason of said mud the cattle would not eat and drink, and in fact, it was impossible for most of said cattle to

reach the water and feed troughs, and in this way they were compelled to do without food and water; that one of said cows by reason of said bogging down was so enfeebled that she was not able to walk and had to be carried and placed in the car; that from the effects of bogging down in the mud the said cow died along the way, and was carried out and thrown off of the car; that the market value of this cow was $20.00. Wherefore said cattle were damaged in the manner and as alleged by plaintiffs. That it was the duty of the said St. Louis & San Francisco Railroad Company upon receipt of the said cattle at the said Paris, Texas, to forward the same within a reasonable time from Paris, Texas, to the said Tulsa, I. T. by the nearest and most direct route, but the said St. Louis & San Francisco Railroad Company failed, neglected and refused to carry and transport said cattle from the said Paris, Texas, to the said Tulsa, I. T., by the nearest and most direct route, and, on the contrary, negligently and carelessly routed and carried and transported said cattle from the said Paris, Texas, to the said Monette, Missouri, thence from the said Monette, Missouri, to the said Tulsa, I. T., in the manner as alleged and charged by plaintiffs; wherefore, this defendant says the
42 said St. Louis & San Francisco Railroad Company should and could have carried and transported the said cattle from the said Paris, Texas, to the said Tulsa, I. T. by a nearer and more direct route, but did not do so; that the St. L. & S. F. R. Co. could have carried said cattle by a nearer and more direct route, to-wit: from the said Paris, Texas, to the said Fort Smith, Arkansas, and there have delivered the said cattle to the next connecting carrier, The St. Louis, Iron Mountain & Southern Ry. Company, thence over said road to Claremore, I. T. and there have delivered said cattle to its own line to be transported and carried from the said Claremore to said Tulsa, I. T., all of which the said St. Louis & San Francisco Railroad Company failed and neglected to do. Wherefore, said cattle by reason thereof were damaged and injured in the manner and as alleged by plaintiffs.

This defendant further says that the said St. Louis & San Francisco Railroad Company so negligently and carelessly handled and operated its trains and cars upon which said cattle were carried and transported from the said Paris, Texas, to the said Tulsa, I. T., in this, to-wit: that said cars and train upon which said cattle were so carried and transported between said points were at most every station between the said Paris, Texas, and Tulsa, I. T., stopped and switched and jammed and bumped together, by reason whereof said cattle were injured, damaged and killed in the manner as is alleged by plaintiffs.

This defendant further says that by reason of the failure of the said St. Louis & San Francisco Railroad Company, its agents, servants, or employees to receive said cattle and handle the same at the said Paris, Texas, in good and sufficient pens, and by reason of its failure to carry said cattle from the said Paris, Texas, to the said Tulsa, I. T., as hereinabove stated, within a reasonable time; and by reason of the failure of the said St. Louis & San Francisco Rail-

road Company to properly handle and transport its cars and
43 trains upon which said cattle were carried and transported from the said Paris, Texas, to Tulsa, I. T., as hereinabove stated; and by reason of its negligence in stopping and delaying said cattle at the said Catoos and other stations on its road, and the handling and switching of its trains and cars at said points in the manner as alleged by plaintiffs and as hereinabove stated; and the unreasonable and unnecessary length of time they were confined in said cars and delayed en route in transportation at said Catoos, as hereinabove stated said cattle were damaged and injured in the manner as is alleged by plaintiffs.

That each and all of the above and aforesaid acts on the part of the said St. Louis & San Francisco Railroad Company was negligence, and but for such negligence on the part of said Railroad Company, the injuries and damages of which plaintiffs in their petition complain would not have occurred.

Wherefore, this defendant prays that citation be issued to the said St. Louis, & San Francisco Railroad Company, by service upon its local agent, herein aforesaid as the law directs, and that upon hearing hereof that the damages and injuries sustained by plaintiffs in the shipment of said cattle be according to law apportioned between this defendant and the St. Louis & San Francisco Railroad Company and that this defendant be held liable only for such damages as occurred to said cattle while the same were in its possession, and that such damages and injuries as accrued to said cattle while same were in the possession of the said St. Louis & San Francisco Railroad Company and its connecting carriers be charged to it. But if this defendant be mistaken in this, then it prays that upon hearing hereof that it have judgment over and against the said St. Louis & San Francisco Railroad Company for the full amount of any judgment that may be rendered against this defendant upon the trial hereof, and that it recover its costs in this behalf expended, as it will
44 ever pray, etc., and for such general and special relief in law or equity, as it may be entitled to under the law and the facts.

H. C. SHROPSHIRE,
Att'y for Defendant T. & P. Ry. Co.

EXHIBIT "A."

Form 1134—Interstate.

The Texas & Pacific Railway Company.

Live-stock Contract, Limiting the Liability of Carriers.

No. of cars.	Initials.	No. of head.	Way-bill series.	Number.
10078	N. E. C.	35	F	1
3768	S. W. S.	39	"	2
1555	"	39	"	3
1248	"	35	"	4
2298	"	41	"	5
5190	H. S. C.	47	"	6
52394	A. T. S. F.	41	"	7
1108	S. J. S. J. V.	35	"	8
5950	N. E. C.	43	"	9
		355		

Mar. L. S. L. & C.

Valuation not to exceed each—

Steers	$30.00
Cows	20.00
Calves	8.00

Live Stock Contract executed at Strawn, Tex. Station, April 22, 1902.

This agreement, made between The Texas & Pacific Railway Co., of the first part, and Eastin and Knox, of the second part, Witnesseth: That for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz: 9 cars, said to contain 355 head of stock cattle, more or less from Strawn, Texas, station to Paris, Station, consigned to Eastin and Knox, Tulsa, I. T., at the rate of $57.50 per car; said rate being less than the rate charged for shipments transported at carrier's risk, and in consideration of said reduced rate and other considerations, it is mutually agreed between the parties hereto as follows:

(1¢ internal revenue stamp.)

First. That the live stock covered by this contract is not to be transported within any specified time nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempt from liability for loss or damage arising from derailments, collision, fire, escapement from

cars, heat suffocation, overloading, crowding, maiming or
45 other accidents or causes nor arising from the negligence of
the first party, and said party of the second part hereby agrees to assume, and does hereby assume, all risks of injury or loss of his stock because of their being wild, unruly, weak or maiming each other or themselves, or of heat, suffocation or other results of being crowded in the cars, or being injured or destroyed by fire, on any account whatever, and especially because of burning hay, straw or other materials used for bedding the cars or feeding the stock, or for any other purpose.

Third. That said second party at his own risk and expense is to take care of, feed, water and attend to said stock while the same may be in the stock yards of the first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants, and agrees to hold said first party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents or employés as aforesaid, and in case the first party should, for any reason undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

Fourth. That the said second party, for the considerations aforesaid, hereby assumes and releases said first party from risk, injury or loss which may be sustained by reason of any delay from the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any of said stock, overloading cars, fright of animals or crowding one upon another, or any and all other causes, except the
negligence of the said first party, and such negligence shall
46 not be assumed, but shall be proven by the said party of the
second part.

Fifth. That in all cases when said first party shall furnish, for the accommodation of said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and deemed his employés while so engaged, and he hereby agrees to hold said first party harmless on account of their acts.

Sixth. That for the consideration aforesaid, said second party further expressly agrees that as a condition precedent to his right to any damage or any loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment, he will give notice in writing of his claim therefor, stating the grounds thereof, to the nearest or any other convenient local agent of said first party, or to its nearest station agent, or to the agent at the delivering station on the railroad which carries said stock to destination, or to the nearest or any other convenient local agent of such delivering road before said stock is removed from the point of shipment, or from the place of destination, and before such stock is

mingled with other stock, and within five days after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated, and will afford a full and fair opportunity for the investigation thereof, and a failure to comply in every respect with the terms thereof, shall be held to be a waiver by said second party of any such claim, and shall be a complete bar to any recovery thereof. No one except a general officer of said first party has authority to waive such notice, and he only in writing.

Seventh. The second party further agrees, for the consideration aforesaid, that in case of total loss of his said stock from any cause for which the first party shall be liable to pay for the same the actual cash value at the time and place of shipment, but in no case to exceed the declared valuations of, if horses, ponies, geldings,
47 mares or stallions, mules or jacks, one hundred dollars; oxen or bulls fifty dollars; cows, steers or yearlings, thirty dollars; calves or hogs, ten dollars; sheep or goats, three dollars per head, which shall be taken and deemed as full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportions.

Eighth. This contract does not entitle the holder thereof, or any other person, to ride on any train, except for the purpose and in accordance with the rules and instructions printed on the back hereof, all of which are hereby expressly accepted and agreed to be made a part of this contract.

Ninth. This contract does not entitle the holder, or other parties to ride in the cars of any train except the train in which his stock referred to is drawn or taken, nor does it entitle him (and the party of the second part so expressly stipulates, admits and agrees) to return passage from Paris to Strawn, Tex., unless the said contract is used within 20 days from the date hereof, and shall be used by those only whose names are written herein. Nor does it entitle any person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of same, as specified in and upon this contract (and does not include women, infants or other persons unable to do and perform the services required as expressed in this contract) to such return passage, the object, purpose and intention of the return pass being to enable the said party of the second part hereto, or his men in charge, as expressed in contract, and no other person, to return to Strawn, Tex., thereon at any time within 20 days from date hereof, and not thereafter.

Tenth. For the considerations aforesaid the said second party hereby further agrees that the said persons in charge of said
48 stock, under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever such persons shall leave the caboose car, pass over along the cars or track, they will do so at their own risk of personal injury from any cause whatever, and that said first party shall not be required to start or stop its trains or caboose cars from the depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Eleventh. It is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, it being distinctly understood that the liability of the Texas & Pacific Railway Company in respect to said stock, and under this contract, is limited to its own line of railway and will cease and its part of this contract be fully performed upon delivery to its next connecting carrier of the stock mentioned herein and receipted for hereby. The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything in connection with the said stock beyond its own line of road, excepting to protect the through rate of freight named herein. It is expressly agreed, however, that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.

Twelfth. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

Thirteenth. It is also expressly understood that all promises and agreements respecting or in any wise relating to the subject
49 hereof are fully expressed herein, and no others are made or exist.

Fourteenth. The evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations on back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

J. M. TUCKER,
Agent for Company,
EASTIN & KNOX,
Shipper,

By EASTIN.

Witness:
L. O. EDMONDSON,
(To be other than either signer of the contract.)

Executed in Duplicate.
Read this Contract Carefully.

(On Reverse side of Contract)

This pass must be written in ink, or otherwise it will not be valid.

Notice: This pass must be carefully filled out by the agent at Destination, to whom the contract will be presented by the party entitled to return transportation. Drover's Pass. Issued by the Texas & Pacific Railway Co., Good for continuous passage only. Issued to J. H. Cook, who was actually in charge of and accompanied to car of live stock, shipped from Strawn, on the 22 day of April, 1902, is not transferable, and must be presented to train con-

ductor for continuous passage by those entitled to free passage under this contract, within 24 hours after the date and hour of issue. As a means of identification, the agent issuing this pass will require each person to write his name in the spaces below, and will cancel the lines not required by drawing a pen through them. If this pass is found in the hands of any person other than the original holder of the stock contract whose name is written above, it then becomes the property of this Company, and conductors will take it up and collect full fare. I hereby agree to all the conditions and provisions of this contract, and I also agree to sign my names and otherwise identify ourselves as the original holders whenever called upon by any agent or conductor to do so. Personal signature of the persons whose names are above written as entitled to free passage under this contract.

J. H. COOK.

Date of issue 4/27, 1902. Hour of 11:30 A. M.

Witness:
T. H. PADDOCK,
Agent The T. & P. R'y.

Special instructions to Conductors. You will require all persons presenting these passes to write their names below, and compare the writing with that of the signature above, in order to satisfy yourselves that the passes are being used by those only who are entitled to free passes under the contract.

L. S. THORNE,
First Vice President and Gen'l Manager.

(Stamped by T. & P. Ry. Co. at Paris, Tex. Apr. 27, 1902.)

The Texas & Pacific R'y Co. 4/22, 1902.

Live Stock Contract.

We, the undersigned persons, in charge of the Live Stock mentioned in the within contract, in consideration of the Free Pass granted us by the Texas & Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations printed on the back hereof, all of which, for the considerations aforesaid, are hereby accepted by us and made a part of this our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employees of said Railway Company for the purposes in said contract stated, and that we agree to assume, and do hereby assume, all risks incident to such employment, and that said Railway Company shall in no case be liable to us for any injury or damages sus-

tained by us during such time for which it would not be liable to its regular employees.

51 (Signed) J. H. COOK.

Cars No. ——

APR. 27, 1902.

Pass on Freight Trains Only. J. H. Cook, parties in charge accompanying stock.

J. M. TUCKER, *Agent.*

NOTE.—Agents will make contracts in duplicate, giving one to shipper, and returning the other to the Auditor, Dallas, Tex.

EXHIBIT "B."

Form 1134—Interstate.

The Texas & Pacific Railway Company.

Live-stock Contract, Limiting the Liability of Carriers.

No. of cars.	Initials.	No. of head.	Way-bill Series.	Way-bill Number.
238[illegible]	H S C	40	F	10
1679	C C C C	46	"	11
1530	H S C	49	"	12
1418	C C C C	51	"	13
1362	H S C	42	"	14
5666	N E C	30	"	15
76303	R I	41	"	16
22886	N E C	33	"	17
3853	H S C	28	"	18

S. L. & C., more or less, valuation not to exceed each:

Steers	$30.00
" Cows	20.00
" Calves	8.00
Cow Ponies	25.00 each

Live stock contract executed at Strawn, Texas, station, April 22, 1902.

This agreement made between The Texas & Pacific Railway Co., of the first part, and Eastin & Knox, of the second part, Witnesseth: That for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party, the live-stock described below, and the parties in charge thereof, as hereinafter provided, viz: 9 cars, said to contain 370 head of stock cattle & Two cow- from Strawn, Tex., Station, to Paris, Texas, consigned to Eastin & Knox, Tulsa, I. T., at the rate of $57.50 per car, said rate being less than the rate charged for shipments trans-

ported at carrier's risk, and in consideration of said reduced rate and other considerations, it is mutually agreed between the parties hereto as follows:

First. That the live stock covered by this contract is not to be transported within any specified time nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempt from liability for loss or damage arising from derailments, collisions, fire, escapement from cars, heat, suffocation, overloading, crowding maiming or
52 other accidents or causes not arising from the negligence of the first party, and said party of the second part hereby agrees to assume, and does hereby assume, all risk of injury or loss of his stock because of their being wild, unruly, weak or maiming each other or themselves, or of heat, suffocation or other results of being crowded in the cars, or being injured or destroyed by fire, on any account whatever, and especially because of burning hay, straw or other materials used for bedding the cars or feeding the stock, or for any other purpose.

Third. That said second party at his own risk and expense is to take care of, feed, water and attend to said stock while the same may be in the stock yards of the first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said first party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents or employés as aforesaid, and in case the first party should, for any reason, undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

Fourth. That the said second party, for the considerations aforesaid, hereby assumes and releases said first party from risk, injury or loss which may be sustained by reason of any delay from the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any of said stock, overloading cars, fright of animals or crowding one upon another, or any and all other causes, except the negligence of the said first party, and such negligence shall not be assumed, but shall be proven by the said party of the second part.

53 Fifth. That in all cases when said first party shall furnish, for the accommodation of said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and deemed employés while so engaged, and he hereby agrees to hold said first party harmless on account of their acts.

Sixth. That for the considerations aforesaid, said second party further expressly agrees that as a condition precedent to his right to any damages or any loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment,

he will give notice in writing of his claim therefor, stating the grounds thereof, to the nearest or any other convenient local agent of said first party, or to its nearest station agent or to the agent at the delivering station on the railroad which carries said stock to destination, or to the nearest or any other convenient local agent of such delivering road before said stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, and within five days after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated, and will afford a full and fair opportunity for the investigation thereof, and a failure to comply in every respect with the terms thereof shall be held to be a waiver by said second party of any such claim, and shall be a complete bar to any recovery thereof. No one except a general officer of said first party has authority to waive such notice, and he only in writing.

Seventh. The second party further agrees, for the consideration aforesaid, that in case of total loss of his said stock from any cause for which the first party shall be liable, to pay for the same the actual cash value at the time and place of shipment, but in no case to exceed the declared valuations of, if horses, ponies, geldings, mares or stallions, mules or jacks, one hundred dollars; oxen or
54 bulls, fifty dollars; cows, steers or yearlings, thirty dollars; calves or hogs, ten dollars; sheep or goats, three dollars per head, which shall be taken and deemed as full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportions.

Eighth. This contract does not entitle the holder thereof, or any other persons, to ride on any train, except for the purpose and in accordance with the rules and instructions printed on the back hereof, all of which are hereby expressly accepted and agreed to be made a part of this contract.

Ninth. This contract does not entitle the holder, or other parties, to ride in the cars of any train except the train in which his stock referred to is drawn or taken. Nor does it entitle him (and the party of the second part so expressly stipulates, admits and agrees) to return passage from Paris to Strawn, Texas, unless the said contract is used within 20 days from the date hereof, and shall be used by those only whose names are written herein. Nor does it entitle any person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of same, as specified in and upon this contract (and does not include women, infants or other persons unable to do and perform the services required as expressed in this contract) to such return passage, the object, purpose and intention of the return pass being to enable the said party of the second part hereto, or his men in charge, as expressed in contract, and no other person, to return to Strawn, Tex. thereon at any time within 20 days from date hereof, and not thereafter.

Tenth. For the considerations aforesaid the said second party hereby further agrees that the said persons in charge of said stock, under this contract, shall remain in the caboose car attached to the

train while the same is in motion, and that whenever such persons shall leave the caboose car, or pass over along the cars or
55 track, they will do so at their own risk of personal injury from any cause whatever, and that said first party shall not be required to start or stop its trains or caboose cars from the depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Eleventh. It is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, it being distinctly understood that the liability of The Texas & Pacific Railway Company in respect to said stock, and under this contract, is limited to its own line of railway and will cease and its part of this contract be fully performed upon delivery to its next connecting carrier of the stock mentioned herein and receipted for hereby. The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, excepting to protect the through rate of freight named herein. It is expressly agreed, however, that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.

Twelfth. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

Thirteenth. It is also expressly understood that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressed herein, and no others are made or exist.

Fourteenth. The evidence that the said second party, after fully understanding and accepting all the terms, covenants and con-
56 ditions of this contract, including the printed rule*d* and regulations on back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, in his signature hereto.

(Signed) J. M. TUCKER,
Agent for Company.
EASTIN & KNOX, *Shipper-,*
By EASTIN.

Witness:
L. O. EDMONDSON.

(To be other than either signer of the contract.)

Executed in Duplicate.
Read this Contract Carefully.

(On reverse Side:)

The Texas & Pacific R'y Co., Strawn, 190-.

Live Stock Contract.

We, the undersigned persons, in charge of the live stock mentioned in the within contract, in consideration of the Free Pass granted us by the Texas & Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations printed on the back hereof, all of which, for the considerations aforesaid, are hereby accepted by us and made a part of this our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employés of said Railway Company for the purposes in said contract stated, and that we agree to assume and hereby assume all risks incident to such employment, and that said Railway Company shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

(Signed) F. CHASE.

Pass on Freight trains only, F. Chase, parties in charge accompanying stock.

(Signed) J. M. TUCKER, *Agent.*

57 NOTE.—Agents will make contracts in duplicate, giving one to shipper and returning the other to the Auditor, Dallas, Texas.

Endorsed: No. 3985. Eastin & Knox *vs.* The Texas & Pac. R'y Co. *et als.* Second Amended Original Answer of Defendant T. & P. R. Co. Filed Nov. 9, 1904. A. C. R. Morgan, Dist. Clerk. H. C. Shropshire, Attorney for defendant, T. & P. R'y Co.

First Amended Answer of the St. Louis & S. F. R. R. Co.

Filed Nov. 9, 1904.

District Court of Parker County, Texas.

No. 3985.

EASTIN & KNOX
vs.
TEXAS AND PACIFIC RY. CO. ET AL.

Now comes the St. Louis and San Francisco Railway Company, impleaded herein by the Texas and Pacific Railway Company, and files this its first amended original answer to and as a complete substitute for its original answer filed herein on the — day of ——

1904, leave of court being granted in this behalf, and for amendment says:

1st. The defendant St. Louis and San Francisco Railway Company demurs generally to the answer and cross action of the Texas and Pacific Railway Company wherein it seeks recovery against this defendant because the same fails to show any cause of action against this defendant, and of the sufficiency thereof, it prays the judgment of the court.

2nd. This defendant specially excepts to the said pleading of the Texas and Pacific Railway Company because the same fails to allege what if any damage to the cattle shipped by plaintiffs was done on the line of this defendant or the amount of such damages or the circumstances thereof or any act or negligence or breach of duty, contractual or otherwise, on the part of this defendant, and of the sufficiency thereof it prays the judgment of the Court.

58 3rd. This defendant denies all and singular the allegations contained in the said pleading of the Texas and Pacific Railway Company and demands strict proof thereof and of this it puts itself on the country.

4th. Further specially answering in this behalf this defendant avers that on the 23rd day of April, 1902, and ever since it owned and operated lines of railway connecting with the line of railway owned and operated by the Texas and Pacific Railway Company at Fort Worth, Texas, at Sherman, Texas, and at Paris, Texas; that the lines constituting the connections at Fort Worth and Sherman, Texas, were direct, practical and short routes from these points to Tulsa, I. T., whereas the route from Paris, Texas, to Tulsa, I. T., was a long and circuitous route as will be hereinafter shown. That on said date and at all times during the progress of the transportation of plaintiff's cattle from Strawn, Texas, to Tulsa, I. T., this defendant maintained its connections and terminals at Fort Worth, Texas, and at Sherman, Texas, and had good and proper yards and feeding facilities at said points so that if it became necessary to feed, rest or water cattle in transit and which might be delivered to it by connecting carriers at said points, it had ample and good facilities for so doing, but that this defendant did not own its own yards at Paris, Texas, which defendant avers upon information and belief were owned and controlled by the Texas and Pacific Railway Company or some other Company at said point and that this defendant had no knowledge or information as to the condition of the stock yards at Paris, Texas, and had no immediate control or direction thereof, but that the defendant Texas and Pacific Railway Company, its agents, servants and employees at all times knew the condition of the said yards at Paris, Texas, and if the same were improperly kept or not suitable for the purposes for which they were intended then that the

59 Texas and Pacific Railway Company and not this defendant was reponsible therefor and fully cognizant thereof.

This defendant would further show that on the 23rd day of April, 1902, and at all times during the progress of the transportation of plaintiffs' cattle from Strawn, Texas, to Tulsa, I. T., it had cars, engines, employees and good facilities at Fort Worth,

Texas, and at Sherman, Texas, sufficient and proper for the handling of said cattle by it and then and there and at all times stood ready and willing to receive the same for transportation from the hands of the Texas and Pacific Railway Company for transportation over this defendant's line to Tulsa, I. T., with expedi*ent* and care and in such manner as is demanded of a common carrier of live stock and had the said Texas and Pacific Railway Company tendered said cattle to this defendant at either of said points it would have received the same and would have expeditiously and with all reasonable diligence and care and without negligence transported the same in the manner demanded of common carriers of live stock and as requested by the plaintiffs of the defendant Texas and Pacific Railway Company to Tulsa, I. T. This defendant further shows that it has no line of railway of its town at Paris, Texas, but that it begins at the State line on the Red River the boundary between the State of Texas and Indian Territory and that it would there be compelled as provided by Art. 4535 of the Revised Statutes of Texas to receive from the connecting carrier the live stock shipment of the plaintiffs which might have been tendered to it by any other carrier handling or transporting the same.

This defendant further shows that if any damage was done to said cattle as alleged by plaintiffs then such damage was done and such acts of negligence and breach of duty were solely caused by the Texas and Pacific Railway Company and not by this defendant for that it shows that at and prior to the shipment of the cattle as averred in plaintiffs' petition it had a transportation agree-
60 ment or basing sheet with the Texas and Pacific Railway Company wherein and whereby the said Texas and Pacific Railway Company was when requested by a shipper so to do compelled to deliver live stock and other freight to it at Fort Worth, Texas, and at Sherman, Texas, for transportation to Tulsa, I. T., or other points beyond the state of Texas and on the line of this defendant. That this agreement was in effect at the time the shipment of cattle was made by plaintiffs and that the Texas and Pacific Railway Company and its agents and employees knew of such agreement or basing sheet and that said Texas and Pacific Railway Company and its agents and employees then and there knew, as the facts adduced will disclose and as are here alleged to be facts that the distance from Strawn, Texas, to Tulsa, I. T., by the most practical and direct route via either Fort Worth or Sherman, Texas, was 392 miles, whereas, the distance from Strawn, Texas, to Tulsa, I. T., via Paris, Texas, was nearly double said distance or 678 miles; that at the shipment of said cattle the defendant Texas and Pacific Railway Company, its agents and employees well knew that the lines of this defendant from Fort Worth or Sherman, Texas, to Tulsa, I. T., were open and in full operation and that this defendant had good and — facilities for handling shipments like the one in controversy and that this defendant would and could have properly handled the same with care and expedition and in the manner required of common carriers of live stock. This defendant denies specially that it could have transported the cattle in controversy from Paris, Texas,

to Tulsa, I. T., by a nearer route than Monett, Mo., and says that at said time it had no nearer route or line from Paris to Tulsa, I. T. This defendant further shows that when it received the cattle in controversy from the Texas and Pacific Railway Company at Paris, Texas, as it was required and compelled to do under the laws of Texas, that it had no choice or option in the matter at all; that said cattle were then in a poor and a damaged condition, the
61 causes of which are and were unknown to this defendant; that while said cattle were in the custody of this defendant it exercised that degree of — commensurate with duty toward said cattle and transported the same as expeditiously as possible, but that if said cattle were damaged by delays while in the care of this defendant or if such cattle were deteriorated by reason of being in transportation for an unreasonable length of time, then that this defendant is not responsible therefore, but that the fault or liability is that of the Texas and Pacific Railway Company in not routing said cattle as requested by the plaintiffs and as demanded by the exigencies of the shipment. And now having answered this defendant prays to be hence dismissed with its costs and for such further relief as it may be entitled to.

WEST, CHAPMAN & WEST,
Att'ys for Def't St. L. & S. F. Ry. Co.

Endorsed: 3985. Dist. Court, Parker Co. Eastin & Knox *vs.* T. & P. Ry. Co. *et al.* First Amended Original Answer of St. L. & S. F. Ry. Co. Filed Nov. 9, 1904. A. C. R. Morgan, Dist. Clerk. West, Chapman & West, Attys. for St. L. & S. F. Ry. Co.

1st Supplemental Ans. of T. & P. Ry. Co.

Filed Nov. 10, 1904.

In the District Court, Parker County, Texas, October Term, 1904.

No. 3985.

EASTIN & KNOX
vs.
THE TEXAS & PACIFIC R'Y CO. ET AL.

Now comes the Texas & Pacific R'y Company, one of the defendants in the above numbered and entitled cause, and, with leave of the court therefor first obtained, files this, its first supplemental original answer in this behalf, and in replication to the first amended original answer filed herein by the St. Louis & San Francisco Railroad Company on the 9th day of November, 1904, says:

62 (1) This defendant excepts to all the allegations in said first amended original answer, says the same is insufficient in law for the said St. Louis & San Francisco Railroad Company to

have and recover the relief therein prayed for, and of the sufficiency thereof prays judgment of the Court.

H. C. SHROPSHIRE,
Att'y for Defendant T. & P. Ry. Co.

(2) This defendant denies all and singular the allegations in said first amended original answer contained, says same are not true in fact, and of this it puts itself upon the country and prays that it go hence without day and recover its costs in this behalf expended.

H. C. SHROPSHIRE,
Att'y for T. & P. Ry. Co.

(3) For further special and separate answer and replication to said first amended original answer this defendant says that at the time of the shipment and transportation of the cattle in controversy, to-wit: the 22nd day of April, 1902, the said St. Louis & San Francisco Railroad Company did own and operate a line of railroad, or a portion of its line of railroad, in the state of Texas, in the county of Lamar, and into the town of Paris, Texas; that if this defendant be mistaken in this, then it says that the said St. Louis & San Francisco Railroad Company owned and operated a portion of its railroad in Texas, or that the said St. Louis & San Francisco Railroad Company owned and operated its own line, or a portion thereof, and its leased lines, and a portion thereof, of railroad in Lamar County, Texas, and into the town of Paris, Texas, and at said time did run and operate its cars and trains into and from the said town of Paris, Texas, over its own line of railroad, or over its said leased line of railroad in the transportation of live stock and other freight from and to said town of Paris, Texas. This defendant further says that at the time said cattle were delivered to the said St. Louis & San Francisco Railroad Company at Paris, Texas, this defendant did
63 not own or have control of any stock or feeding pens or yards at the town of Paris, Texas; that is, that said cattle were not delivered or received at said point or unloaded at said point into any stock or feeding pens that at said time or since said time were under the control of this defendant, The Texas & Pacific Railway Co., and that the said pens into which said cattle were received and unloaded at said point were at said time owned or under the control and management of the said St. Louis & San Fran[illegible] Railroad Company.

Wherefore this defendant prays upon hearing hereof for such relief as is prayed for in its prayer contained in its second original answer filed in this court on the 9th. day of November, 1904.

H. C. SHROPSHIRE.
Attorney for Defendant The Texas & Pacific Railway Company.

Endorsed: No. 3985. Eastin & Knox *vs.* Texas & Pacific Ry. Co. *et al.* First Supplemental Answer of the Defendant, T. & P. Ry. Co. *et al.* Filed Nov. 10, 1904. A. C. R. Morgan, Dist. Clerk. H. C. Shropshire, Att'y for defendant T. & P. Ry. Co.

Statement of Facts.

Filed Dec. 12, 1904.

In the District Court, Parker County, Texas, October Term, 1904.

No. 3985.

EASTIN & KNOX
vs.
THE TEXAS & PACIFIC R'Y COMPANY ET AL.

Be it remembered that on the trial of the above numbered and entitled cause the following facts and none other were proved, to-wit:

FRANK CHASE.

FRANK CHASE, a witness for plaintiffs, testified: I live at Jacksboro; about April 23, 1902, I was in the employ of Eastin & Knox, handling cattle; I went to Strawn three, four or five days previous to April 23, 1902, to order some cars in which to ship cattle;
64 I ordered the cars for April 23, 1902; my recollection is that I ordered eighteen cars; Mr. Tucker was the agent of the Railway Company at Strawn; I ordered the cars for the purpose of shipping cattle to Tulsa, Indian Territory, and at the time I ordered them I told Mr. Tucker I desired the cattle routed via Ft. Worth and the Frisco Railroad, that is, to be carried from Ft. Worth to Tulsa, I. T., by the Frisco; I found Mr. Tucker in the office of the T. & P. Ry. Co. at Strawn; I think the office was a box car at that time; it was my understanding that he was controlling or attending to the business of the T. & P. at Strawn; he received my order for the cars; I think the cattle in question were shipped from Strawn on April 22nd, instead of April 23rd; when we went to Strawn on that day we did not tell Mr. Tucker that we wanted the cattle routed around by Paris; we did not want them routed that way; when I ordered the cars I asked Mr. Tucker to route the cattle via the Frisco from Ft. Worth to Tulsa, and when we went back to Strawn with the cattle, and had loaded the bigger part of them, I asked Mr. Eastin to go down and give the agent the billing of the cattle, so that by the time we finished loading he would be ready to let them go, and I told Mr. Eastin to be sure and see that the cattle were routed the way I had ordered the cars, that is from Ft. Worth to Tulsa over the Frisco; the agent did not route the cattle that way, and I went down and talked to him about it; he positively refused to route the cattle the way we wanted them to go, and did not route them that way; he said he could not route them that way, that he had instructions to the contrary; I do not recollect the exact language he used, but that was about the substance of it—that his instructions were not to route them that way, and that he would not do it; he never did, in my

presence, offer to route the cattle around by Sherman; he did not mention Sherman to me at all; I guess I was present when the contract was signed; I signed a shippers' contract, which I had
65 to do in order to travel on the train in which the cattle were carried; (the witness here identified a paper shown him as the contract which he signed) Captain Eastin objected, in the presence of the agent of the railway company, to the cattle going around by Paris; Captain Eastin, some one else, and I met Mr. Tucker just about the railroad crossing, and we talked the matter over there; it was at that time that we objected to routing the cattle via Paris; I insisted that taking the cattle around by Paris was taking them all around the world; I had been over the same route before, and knew all about the way the cattle would have to go; Captain Eastin and I signed the contract because there was no way out of it; we had the cattle loaded and they had to go; there was nothing else to do with them; we could not take them to another place, as there was no other shipping point near there; we had no pasture to take them to, as the time was up on the pasture where we had been holding them; we talked that all over while we were standing there at the crossing, in the presence of Mr. Tucker; Mr. Tucker just said his instructions were to not route the cattle any other way; he positively refused to route them via Ft. Worth, and said that that was the only route he could give us; that he had instructions to that effect; the cattle left Strawn very late in the evening, between sundown and dark—possibly right at dark; we had the conversation with Mr. Tucker during the time the cattle were being loaded; this was on the afternoon of April 22nd, probably a half hour, or possibly an hour, before the train pulled out; the cattle reached Paris sometime after noon the next day, April 23rd; they arrived at Ft. Worth sometime in the fore part of the night of the 22nd; upon arrival at Paris they unloaded, fed and watered the cattle; the bigger part of the pens there were in pretty hard shape; they were muddy, especially the pens where the water was; in most of the pens the cattle could not get to the troughs on account of the mud; I stayed at the pens with the cattle all
66 the time, except what little time I was away getting something to eat; I am unable to say how many of the cattle were able to get to the troughs to eat and drink, but, as I said, in some of the pens very few of the cattle watered, while in other pens the troughs were not muddy or in such bad shape, and the cattle watered all right; it is my recollection that all of the pens on the north side were in bad shape, and very few, if any, of the cattle watered there, but the pens on the other side were in better shape, and the cattle that were on that side probably watered better; I did not pay any particular attention as to which side of the pens the most of the cattle were, and do not remember about that; some of the cattle that I saw walk out into the mud went down to their knees, and some of them probably further; turning the cattle into the pens there was worth very little to them; it is the intention to allow the cattle to remain in the feeding pens for three or four

hours, and eat and drink; I think probably the law requires that the cattle be unloaded for a certain length of time for food and rest; I think under the circumstances the cattle in question got very little rest or food; the expense of feeding the cattle at Paris was fifty odd dollars, I do not remember the exact amount; some of the cattle were injured while at Paris; one cow bogged in the mud and had to be pulled out and carried into the car; she afterwards died; she was unloaded at Tulsa together with the rest of the cattle; there was one crippled cow in the bunch, which died at some place between the loading point and Paris, and was left at Paris; I do not know how she came to be crippled; I tried to get them to cut her out of the bunch and not ship her, but they insisted that she was in reasonably good order and ought to be able to go; this happened at the pasture when we were getting the cattle ready to ship them; the cattle were taken from Paris to Monette, Missouri, and at Monette we took the branch of the Frisco which used to be known as
67 the Tulsa branch, but which is now known by another name, and came down to Tulsa; we left Monette sometime in the forenoon; I do not remember the exact hour; and arrived at Vinita, I. T., sometime about the middle of the afternoon; upon arrival there Mr. Cook went to town and got something to eat, and we then went through the cars and got the cattle up, and when we left there all of the cattle were up, except this cow which had been helped back into the car; the run from Paris to Vinita was fairly good; in fact, the run was fairly good all the way through after we started, until we left Vinita; the next stop we made after leaving Vinita was at Catoosa, in the Cherokee Nation; I am unable to tell everything that happened while we were at Catoosa; they kept us there all night; Catoosa is fifteen or sixteen miles from Tulsa; we reached Catoosa in the early part of the night; I do not remember the exact time we arrived there, but we left Vinita about three or four o'clock, and it is only fifty miles from Vinita to Catoosa; we left Catoosa along towards daylight the next morning, and reached Tulsa at Eight o'clock the same morning; we had been from three or four o'clock the previous afternoon going from Vinita to Tulsa, a distance of sixty-five or sixty-six miles; I don't remember what day of the month that was; they kept us at Catoosa all night, and see-sawed and choused us around generally; I do not know what the trouble was, but a whole lot of trains met and passed us during the night, and that seemed to be the cause of the general delay—too many trains meeting there; I only know from what I was told the reason the railway company gave as to the cause of the delay; the morning after we arrived at Tulsa the agent there told me why so many trains had met at Catoosa; he said the night operator at Tulsa had taken what money there was in the safe that night and ran away, and that they did not know it until sometime the next morning; the switching back and forth and jolting around at Catoosa knocked the cattle down and choused them around until it was utterly
68 impossible for us to keep them up; they were bruised up pretty badly; we worked on them just as long and just as

often as we could get to them, getting them up; it knocked off their hair and skin; I think there were about fifteen head down when we got to Tulsa, and I think we got them all up and they all walked out of the car, except seven or eight head, which we had to drag out; I do not think any of them was dead, but seven or eight of them were helpless, and could not get up, and could not stand after we helped them up; including those which were down in the cars upon arrival at Tulsa, and those which died after they were unloaded and before I took the cattle to the pasture, I lost twenty head of the cows; I held the cattle at Tulsa for three or four days before they were able to be taken to the pasture, which was eight miles from Tulsa; I had to hold them at Tulsa for that length of time to allow them to rest and get in shape so they could make it out to the pasture; they were in such condition that I could not take them to the pasture immediately upon arrival at Tulsa; on the way from Tulsa to the pasture I lost four head more; they just got so they would not go, and died; within the next eight or ten days I lost fifteen or sixteen head more, that is, they died after I got them to the pasture; when the cattle were loaded at Strawn they were in very good shipping order; I do not remember just what the expenses incurred by reason of having to hold the cattle at Tulsa for three or four days amounted to, but I had to hire several men and feed them and their horses, in addition to my own expenses; I paid a dollar a day each for board for the men; I paid some of the men $1.50 per day for their services, and paid the others $2 per day; I made a memorandum of the expenses at the time I paid out the money, because I expected to have to report to my employers what I was spending their money for; I paid the hands $27, paid $11.40 for board, $2 for horse hire, and $4.50 for taking care of horses; I do not remember just what I paid for pasturage at Tulsa; there was a
69 small pasture there in which I left some of the cattle when I took the main herd and went away from there; I paid the man something for that pasture and also something for looking after the cattle that I left there, but I do not remember what it was; we shipped about 615 head of cattle from Strawn to Tulsa; I went to work feeding these cattle during Christmas week before they were shipped, and they were fed from that time until the day we got the cattle ready to take them to Strawn; I think there were 540 cows in the bunch; there was a sufficient number of males in the herd to serve the cows; there were 50 head of males down there; these were well bred cattle—good grades; I do not know what kind of calf crop was realized, because I left there before the cattle were shipped to market; the indications were, from the way the cows looked at the time they were shipped, that there would be a very good calf crop; I have been in the cattle business for fifteen years or longer; it is generally supposed among cattle men that under reasonable circumstances and with proper care seventy-five per cent. is not an unreasonable approximate on a crop of calves; I remained at Tulsa for about six weeks after these cattle were shipped there; I had also been there previous to that time, and have been there since;

I had been at Catusa, which is just a short distance from Tulsa, about a Year previous to that time with a big lot of cattle; I have not stopped off at Tulsa since the shipment in question; I have passed through there, however, and have been in that vicinity; I have been staying down this side of Tulsa this year—have been there five months; I was there with cattle; if the cattle in question had reached Tulsa in the condition in which they should have reached there, and had been treated right, they would have been worth at least $20 per head; they were worth at least five or six dollars per head less on account of the condition in which they did arrive at Tulsa than they would have been worth had they arrived
70 there in proper order; there was a big loss in the calf crop, which is one way of determining what the actual damage was; and another thing, it would be hard to tell just how much the cattle were set back from getting fat; if the cattle had gone right on and gotten there quickly, they would have gotten fat a good deal quicker, and would have been shipped to market a good deal earlier; it takes cattle a long time to get over being choused as these were; I remained with these cattle for six weeks after they were unloaded, during which time lots of the cows were losing their calves; I found dead calves pretty nearly every day up to the time I left there, but did not keep any account of them; including the stop at Paris, the cattle in question were out sisty hours, from the time they were loaded until they were unloaded; it is about twice as far via Paris and Monette to Tulsa as it is via Ft. Worth and Sherman to Tulsa; I think it is 303 miles from Ft. Worth to Tulsa by the route we wanted to go, and by the other route it is about double that distance; I do not know the distance from Sherman to Tulsa, nor do I know how far it is from Sherman via Paris and Monette to Tulsa; upon arrival at Tulsa I sold some motherless calves for four or five dollars per head, and I suppose that was the market value of calves there at that time.

Cross-examination (on behalf of the T. & P. R'y Co.):

I have lived at Jacksboro for about thirty seven years; I have been handling cattle a god deal of that time; I have handled all kinds of cattle; I cannot say how many times I have shipped cattle over railroads during that time, but I have done lots of shipping; I have been shipping off and on for fifteen years over different railroads; previous to this time I had shipped some cattle over the T. & P., the Frisco and quite a good many others; I do not think I had shipped cattle over the T. & P. previous to this time but once; I had also shipped over the Texas Midland, the Santa Fe and Iron Mountain; in making shipments of cattle I would just order the
71 cars and route the cattle the way I wanted them to go; I did not always sign shiping contracts as I did in this instance, as this time I was shipping the catle for Eastin & Knox, and at other times I was shipping for myself; at such times I signed the contract as owner and shipper also; every time I shipped cattle there was a contract made and signed, just as there was in this case; from my

experience I knew I would have to sign such contract, that the railway company always required it to be done; I do not remember how long I had been working for Eastin & Knox at the time of this shipment, because I had not been working for them regularly; I had been working with this bunch of cattle since Christmas week; the cattle were on the old Johnson ranch, above Strawn; I suppose it was an ordinary cattle ranch; I think the season of 1901 was very dry; the drouth would naturally dry up the grass to some extent; during the winter of 1901 and 1902 there was some grass in the pasture in which these cattle were, but there was not plenty; grass was scarce; I do not know how many head of cattle were in that pasture, because I do not know the number that they took back home; the pasture was not overstocked, if there were as many acres in it as they claimed; they took some of the cattle out of that pasture back to the upper ranch because the time was up on it; we took these cattle to Strawn on the 22nd; I think we reached there right about noon; we drove the cattle something like eight or ten miles; we started from the ranch early in the morning—just as early as we would conveniently get off; I do not remember just what time it was; when we got to Strawn we put the cattle in the stock pens; I think there were 540 cows in the bunch and ninety-some-odd calves; I do not remember how many bulls there were in the bunch, because after the cattle were taken to that ranch a lot of the bulls were castrated, and I was not present at the time it was done; I do not remember how many bulls were shipped; they were mostly young bulls, ranging from two to three and four years old; going to Strawn the bulls were
72 driven with the other cattle; most of the bulls and stags were loaded into the cars separately; the cows and calves were loaded together; there were very few steers in the bunch, I do not remember exactly how many; there were very few yearlings; I do not know anything about the ages of the cows; there were no very old cows in the bunch; I do not think there were any bulls loaded into the cars with the cows and calves, but I am not positive about it; we had two horses in the shipment; we put them in the cars with the cattle; we left Strawn late in the evening, about dark, and arrived at Ft. Worth some time in the early part of the night.—I do not remember the exact time; I do not believe I looked at the cattle but once between Strawn and Ft. Worth, and I don't remember where that was; we remained at Ft. Worth about half an hour; we got to Paris some time after dinner; I know we had lunch there and called it dinner; I expect I slept some of the time between the time we left Ft. Worth and daylight the next morning, but don't remember how much of the time; between the time we left Ft. Worth and daylight the next morning I looked at the cattle every time I had a chance, but do not remember how many times; I always make it a point to look at my cattle every hour or two; I do not remember how often I looked after the cattle between daylight and the time we got to Paris; upon arrival at Paris the cattle were unloaded and put in the pens; I suppose they were the Frisco pens, as they were on the Frisco right of way; I do not think anybody there told me who the pens belonged to; the cattle were delivered to the Frisco

Railroad at Paris; I suppose the Frisco had charge of the pens at Paris into which the cattle were unloaded; immediately upon arrival at Paris the cattle were placed on the connecting track between the T. & P. and the Frisco, and it was only a short time until they were taken to the pens and unloaded; the men in charge of the Frisco pens unloaded the cattle; I think it was the Frisco that took the cattle off of the connecting track and carried them to the pens; the
73 cattle remained in the pens for three or four hours; men who had charge of the Frisco pens fed the cattle; the reloading gang of the Frisco loaded the cattle back into the cars at Paris; a Frisco train carried the cattle out of Paris; I think the first time the conductors were changed after leaving Paris was at Monette, Missouri, but I am not positive about it; I do not know how far it is from Paris to Monette; I do not know what kind of soil was in the pens at Paris, because of course, there was more or less manure and such stuff in it, but I would judge that it was black dirt; generally, the mud was just around the troughs; I do not think there was any mud away from the troughs; the mud in the pens kept a good many of the cattle from drinking; in all of the pens on the north side there was more or less mud around the troughs; I do not remember how many pens there were in that side, nor how many of the cattle were on that side, but I would judge that half of the cattle were over there; keeping the cattle in the pens there did not have the desired effect on them; it was worth practically nothing to them because there were so many of them that did not drink any water, and consequently would not eat much; after the cattle were unloaded at Paris I went to town to get something to eat; it is between a quarter and a half of a mile from the pens to town; I remained up town between a half and three quarters of an hour; I do not know what the cattle were doing while I was up town; I do not know whether or not they were eating or drinking during that time; they might have been eating and drinking while I was gone, but they did not; I know they did not, because it is very easy to tell whether a cow is full of water; we left Paris during the latter part of the evening, before dark; I do not remember how many time- the train stopped between Paris and Monette; they generally stop at the stations; they did not do any work at the stations between Paris and Monette; I do not know how many cars there were in the train; there were other cars be-
74 sides ours in the train, but I do not know what was in them; I do not suppose it was a local freight train in which the cattle were carried from Paris to Monette; I do not remember whether they took on any more cars between those points or not; they might have done so; I do not remember whether or not they set out any cars; I do not remember how much of the time I slept the first night after leaving Paris; I suppose I slept some of the time; I looked at the cattle several times; I do not remember how many times the train was side-tracked the first night after we left Paris; I think probably we met a passenger train or so; sometimes in meeting trains they switched the cars in which the cattle were, and I think sometimes we had the right of way; we had no kick whatever to make as to the handling of the train or the time made over the Frisco,

except from Vinita to Catusa; we did not stop at Vinita more than thirty minutes; the train was not switched there at all; I do not believe the train was switched at any point between Vinita and Catusa; it is fifty miles from Vinita to Catoosa; we left Vinita about four o'clock, and got to Catoosa about night, or a little after night; I do not remember exactly how long it took to make the run; we remained at Catoosa until daylight or a little after daylight the next morning, because it was eight o'clock when we got to Tulsa, a distance of only sixteen miles; they see-sawed the cars in which the cattle were, in and out all night long at Catoosa; sometimes they would shake the cattle up pretty smartly, and another time it would not be quite so bad; the treatment the cattle received at Catoosa of course hurt them worse than any other part of the trip, because every time they, as I term it, changed ends with the engine they knocked more or less of them down, and they were bruised and skinned and crippled pretty badly; we had a fairly good run from the time we left Strawn until we got to Catoosa; we had no complaint at all to make until we reached Catoosa; all of the damage to the cattle did not happen at Catoosa; in my opinion, the principal part, or a great deal, of the damage was caused by the cattle being shipped around by the long route; as far as the handling of the train, etc. is concerned, Catoosa is the only place at which they were choused around to amount to anything, or received any rough handling or rough treatment; the cattle were carried from Strawn to Paris in good time and arrived there in good condition; I had no complaint whatever to make as to that part of the run; they were delivered to the Frisco at Paris in good shape; I remained at Tulsa for three or four days after the cattle were unloaded there; during that time I turned some of the cattle loose on the commons, but some one had control of it, and they run me away from there before I was able to go; I then took all of the cattle which were able to go to the pasture, a good many of them were not able to go, and I left a few of them on the commons, and left some of them in a little pasture right at the shipping pens; I took one hand with me from Strawn to Tulsa, Mr. Harry Cook; he left Tulsa the day after we got there, and came back home; there were 615 head of cattle and two horses in this shipment; I herded these cattle on the commons at Tulsa; the commons was open country; all of the country up there was fenced, except the little place where I held these cattle; I do not remember how many of the cattle I put in the pasture; I put them in the pasture because they were not able to go out with the main bunch; I think I kept four men with this herd of cattle while I was holding them on the commons; it took that number of men to herd the cattle, for the reason that after the cattle were unloaded at Tulsa the cows were very hungry and started out to get something to eat and drink, and did not pay much attention to the calves, and as a result the calves scattered very badly and were running all over the country; the truth of the matter is, four men could not hold them; I have been engaged in the cattle business about fifteen years; I have seen cattle men employ four hands, or

more, to herd 615 head of cattle on the range lots of times;
76 under ordinary circumstances, one or two men can herd and take care of 615 head of cattle on the range, but you can hardly get enough men around a bunch of calves to hold them if they want to go; I hired one horse at Tulsa; I kept an account of my expenses and put it down in my book at the time I paid out the money; I suppose it was April 25th that we arrived at Tulsa; I did not set down the date at the time I was making the entries in the book; there is a date in the book May, 1902, but I do not remember when I put it there; I suppose I put it there at the time I made the entries, but am not positive about it; I did not buy cattle after I arrived at Tulsa, and did not sell any, except the calves; I did not see any cattle sold while I was at Tulsa; I base my opinion as to the market value of these cattle, on what such cattle were bringing as stock cattle on the markets; I do not know what the market value of these cattle was at Tulsa; if these cattle had been handled with due care en route, and delivered at destination within a reasonable time, there would naturally have been some shrinkage and damage to them, but I cannot tell what it would have amounted to; if the cattle had been shipped by the short route I could have come nearer telling what the natural damage would have been; the shipping of cows with calf has a tendency to cause them to drop their calves in the manner that I have testified about; in all probability these cows would have dropped their calves in that manner, irrespective of the route they were shipped over, that is, some of them; such a result occasionally grows out of the driving and moving of cattle any distance, so that they become fatigued; immediately upon arrival at Strawn, we put these cattle in the shipping pens; we commenced gathering these cattle for shipment just a day or so before we took them to Strawn; we had fixed a pasture close to the house that would hold the cattle, and we were gathering them and holding them in that pasture; I do not know how many acres there were in that pasture, but it was a pretty good sized one; I do not remember just when we commenced to gather the cattle, but it was something like three or four
77 days before they were shipped there was water in the pasture in which we held the cattle—Ioni creek, there was plenty of water in it; the grass in the pasture was short, but we were feeding the cattle oil cake; in gathering the cattle we ran them just as little as possible; once in a while we probably struck a lope, but did not have any great amount of running to do; if a cow with calf runs enough she will lose the calf; in driving the cattle from the pasture to Strawn, we had a good deal of trouble with the calves, but none to amount to anything with the cows; we had to run a good many of the calves, and I expect ran some of the cows, but nothing like we did the calves; none of the cattle got scared between the pasture and Strawn, and we had no stampede or anything of that sort; after we got to Strawn we put the cattle in the pens as quick as we could; I think we put all of the cattle in the pens at one time; it may be that we only put as many of the cattle into the pens as they would hold, and herded the balance of the cattle on the outside of the pens until those in the pens were loaded; we had six or seven men with the

cattle between the pasture and Strawn; I do not know how many men herded the cattle which were held outside of the pens at Strawn; I think some of the cattle got scared while they were being held outside of the pens; a train passed there while we were trying to get them in the pens, and we had right smart of a race after them; they almost stampeded, they were pretty hard to hold; I do not know that the whole bunch ran; the cattle ran down the lane quite a little ways; the leading cattle got off two or three hundred yards. It is my judgment that it has a good effect upon them to load cattle into the cars indiscriminately, as they were in this instance, because they ship all right when loaded that way; before we took these cattle to Strawn we cut back all of the weak poor cows, and everything that we did not think would ship all right; we did not cut back
78 the crippled one which I mentioned, because of an oversight; I called their attention to it, and wanted them to cut her out, but they would not do so; Mr. Eastin did not know the cattle as well as I did, and when I insisted that she was crippled, he insisted that she was not; I suppose some of the cattle in this shipment were weaker than others, as it would hardly be possible for them to be all of the same strength and flesh; none of the cattle were fat; they were all poor; the purpose in shipping these cattle was to get them where there was more grass, and better grass, so they would get fat and in condition to go to market; I first had the conversation with Mr. Tucker about the shipment of these cattle, three or four days before we took the cattle to Strawn; I do not believe any one was present at the time we had the conversation; I think Mr. Tucker was in his office at that time; I think probably Mr. Gracey was in the car when I went there, but I do not know whether he was present at the time I made the order for the cars, or not; the next conversation I had with Mr. Tucker was on the day we loaded the cattle; I had that conversation with him in the evening, at that time most of the cattle were in the cars; at the time we had the conversation I think Mr. Tucker, Capt. Eastin, Mr. Stewart and I were present; Mr. Tucker said at that time that he had instructions not to bill the cattle via the Frisco from Ft. Worth; he told us he did not have authority to bill the cattle that way, and that he could not do so; he told us the cattle would have to go via Paris; Mr. Tucker might have said to us in that conversation that he would bill the cattle on the local rate to Ft. Worth, and there deliver them to us and let us ship them any way we desired from that point, but I do not remember that he told us that; I cannot say that he did or did not offer to do that; if Mr. Tucker ever said anything about shipping the cattle via Sherman, I did not hear it; I do not think Capt. Eastin told Mr. Tucker, in my presence, that he had already made arrange-
79 ments to ship these cattle over the Frisco from Ft. Worth, and Mr. Tucker told him that he had no authority to give him a through rate over the Frisco by way of Ft. Worth, but that he would give him the local rate to Ft. Worth and let him make his own contract with the Frisco from there on; they probably had that conversation before I went there; I signed the contract which has been shown me, with the understanding that that was the

only thing that we could do; I did not object to signing the contract; I do not think I said a word about it; I do not think we had any further talk about the matter.

Cross-examination on behalf of the St. L. & S. F. R. R. Co.:

Mr. Tucker was the agent of the Texas & Pacific R'y Co. at Strawn, in April, 1902; I do not know his given name; he is in the Court room; I ordered these cars from Mr. Tucker three or four days previous to April 22nd; I ordered them within the time required by law, whatever that is; I told Mr. Tucker that I wanted 18 stock cars, to be loaded there on the 22nd, for Tulsa, Indian Territory, and that I wanted them to be shipped Frisco from Ft. Worth; Mr. Tucker said "all right;" Mr. Tucker and I had some conversation about the matter at that time; at first he could not locate Tulsa and had to get out his book of reference—one of these things that points out the station; I do not know what it is called; he got that book and found the place; I told him that was the place, and that we would be there on a certain day with the cattle; he also told me that I had better see him again before we brought in the cattle, so as to be sure about the cars; that was the only conversation that we had at the time I ordered the cars; I do not believe any one else heard me make the order for the cars; I do not think there was any one else in the *car* at that time; Mr. Tucker was probably outside of the office when I first approached him in reference to this matter, but we went into the office and were in the office when he took the order for the cars;
80 three or four days after that we took the cattle to Strawn, and we were then for the first time informed that the cattle had to go through Paris; we were not so informed until we had the bigger part of the cattle loaded; at that time the shipping contract had not been signed; in the conversation we had at the railroad crossing it was stated that there certainly ought to be a shorter route than by way of Paris, but Mr. Tucker said his instructions were not to bill the cattle from Ft. Worth via the Frisco, and that they could only go by Paris; if he ever mentioned Sherman I did not hear it; in going to Tulsa from Ft. Worth by way of the T. & P. we pass through Sherman, which is also on the Frisco; both roads go through Sherman; these cattle went through Sherman en route from Ft. Worth to Paris; I do not know what time we reached Sherman; it must have been sometime late at night, or about daylight in the morning; just prior to the execution of the shipping contract, we made a kick about the shipment going the way it did go; we opposed it just as long as we possibly could, and insisted that there was a nearer route, and that we were entitled to it and ought to have it; the only route I suggested was via the Frisco from Fort Worth; I wanted the cattle to go over the Frisco from Ft. Worth, and ordered the cars that way; the run on the Frisco from Paris to Tulsa was satisfactory, with the exception of the delay at Catoosa; that was where we had the biggest part of the trouble; we were delayed at Catoosa from the fore part of the night until about daylight the next morning; with the exception of the trouble at that point, the run was satisfactory all the way through on both roads.

Redirect examination:

When I ordered these cars Mr. Tucker made a written note of the order; I asked him to give me a copy of the memorandum, but he would not do it, stating that if he gave me a copy of it it would be insuring that the cars would be there, or something to that effect.

81 Recross-examination on behalf of the T. & P. Ry. Co.:

If these cattle had not been delayed and roughly handled at Catoosa they would not have been damaged as badly as they were; they would probably have been damages but very little; I cannot say that I have repeated every word that passed between Mr. Tucker and I, but I have stated the substance of everything that was said; I do not think that we talked about any subject other than what I stated when being cross-examined on behalf of the Frisco; there was nothing said at that time about any rate; I knew at that time that when we came in to ship the cattle we would have to sign up contracts; at that time I did not think anything about the rate, because the rate is always fixed; there was nothing said about the rate at that time; I did not give Mr. Tucker a written order for the cars; I think I was present when the contracts were signed; I am not positive as to whether or not I saw Mr. Eastin sign the contracts; I have already stated, and it is a fact, that while we were loading the cattle I told Mr. Eastin to go up and get the contracts signed and fixed up so as to save time; Capt. Eastin went up there, but I do not know whether he fixed up the contracts or not, because I was not present.

Redirect examination:

I gave Mr. Tucker a verbal order for the cars, and he made a written note of it; I did not sign anything at that time; I told Capt. Eastin to go and see about the contracts, and he went down there and found out the way they were going to route the cattle, then came back after me, and we both went down to the depot; Mr. Tucker was not there, and we went out to find him, and met him about the railroad crossing, and that is where we had the conversation; that was the only conversation I had with Mr. Tucker with reference to the routing of the cattle, except the conversation I had with him when I ordered the cars, and that was the time that we insisted that the cattle should not be shipped around by Paris and Monette;

82 I do not say that shipping these cattle twice the distance, did not injure them; from my experience in shipping cattle I know it to be a fact that the longer cattle are confined in the cars and on the road, the more they are injured and damaged; the more you chouse them and the further you run them, the worse it is for them; the fact that they had been shipped around the long way made them more susceptible to damage at Catoosa than they would have been shipped by the short route; Catoosa is north and east of Tulsa; if the cattle had been moved from Ft. Worth to Tulsa by way of Sherman they would not have gone through Catoosa; it was owing to the fact that they went via Paris that the cattle passed through Catoosa.

S. W. EASTIN.

S. W. EASTIN, one of the plaintiffs, testified: My name is S. W. Eastin; I reside at Jacksboro; I am a member of the firm of Eastin & Knox; I think the cattle in controversy were shipped about April 22, 1902; the cattle were in about the usual condition for that time of the year; there were cows, a few steers, some bulls, and probably some stags in the bunch; I directed these cattle to be shipped to Ft. Worth and thence over the Frisco to Tulsa, Indian Territory; I signed the contracts by which the cattle were to be shipped around by Paris, because I thought that was the only way I could ship them; I got that idea from the agent; the agent said positively he would not ship the cattle via Ft. Worth, there to be delivered to the Frisco; I did not hear him say anything about delivering the cattle to the Frisco at Sherman; I knew at that time that the Frisco was the direct line from Fort Worth to Tulsa; the agent Mr. Tucker, said he would not route the cattle to be delivered to the Frisco at Ft. Worth, because he could not do so; I think he said the road would not let him do so, or something of that kind; I did not see these cattle for some time after they got to Tulsa; I had a pasture near Tulsa; at the
83 time I was at Tulsa I was acquainted with the market value at that place of such cattle as the ones in question; I do not remember exactly what time I went to Tulsa; I think I went there in May; I had never been at Tulsa before that; this was the first shipment I had made to Tulsa; I think there were something over 500 head of cows in this shipment; the calf crop from these cows was very light; I think the cattle had all been loaded at the time the contracts of shipment were signed. I had no pasture near Strawn to which I could have taken these cattle if I had desired to unload them; the lease on the pasture where I had been holding these cattle had expired about a week before that, I think; Mr. Chase was in charge of this shipment; I do not know what time in May I went to Tulsa; I remained there from May until about December; from my knowledge of these cattle, and knowledge of the market for stock cattle at Tulsa when I arrived there, I think these cattle would have brought twenty dollars per head had they arrived at Tulsa in the condition they should have arrived; I have been in the cattle business off and on for many years; I have handled a good many cattle in the Territory, near Tulsa, and think I was well acquainted with the market value of stock cattle, such as these, up there in that season.

Cross-examination on behalf of the T. & P. Ry. Co.:

I think the first trip I made to Tulsa was in May subsequent to this shipment; I did not go with this shipment; I do not know anything about what the market value of the cattle was at Tulsa on April 23, except from the fact that I was there in May, following; I have been in the cattle business a long time off and on; I do not know how often I had shipped cattle prior to the time of this shipment, but I have shipped a great many beef and stock cattle; I do not recollect what road I have shipped over, but I have shipped over a number; I

do not know how many times I have shipped over the T. & P. I used to ship a good many cattle from East Texas, but do not recollect what roads they went over; I do not recollect whether or not
84 I have made several shipments over the T. & P. In shipping cattle I always had to sign contracts as I did in this instance. I always knew that I would have to sign a contract; when we brought these cattle down to Strawn for the purpose of shipping them I expected to have to sign contracts as usual; the first time I had any conversation with Mr. Tucker about the shipment of these cattle, was after the cattle got to Strawn and a good many of them had been loaded; the cattle got to Strawn in the evening before night; I do not remember just how many of the cattle had been loaded at the time I had the conversation with Mr. Tucker, but we had loaded a good many of them; we had probably loaded as many as one-half or more of them. The first conversation I had with Mr. Tucker was at the pens; I do not remember who was present at that time. The first conversation we had about shipping the cattle was at the railroad crossing; I think Mr. Chase and Mr. Stewart were present at the time we had that conversation; Mr. Tucker was routing the cattle via Paris, and I was protesting against shipping them that way; he said they would not allow him to ship them via Ft. Worth; I do not remember that Mr. Tucker said he could and would give me the local rate and ship the cattle to Ft. Worth and let me turn them over to the Frisco, or anybody else there that I wanted to; if he had made such a proposition I would not have accepted it; he possibly might have said it, but I do not recollect it; I insisted on having the through route of shipment; I got the cars for the through route; I do not recollect telling Mr. Tucker that I did not want the cattle shipped to Ft. Worth, as I did not want to be bothered with making contracts with other railroads, but I know that I would not ship a train load of cattle into as large a town as Ft. Worth, at night; Mr. Tucker told me he would not give me through route by that way. I do not know whether he told me the company had directed him not to do so, or not; he might have told me that; if he said anything about
85 shipping the cattle via Sherman, I did not hear it; he must have said that in an undertone, or I would have heard it; I did not object to signing these contracts, except that I did not want to go by Paris; I signed them because I believed I could not ship the cattle any other way; it is my recollection that when these contracts were signed the cattle were all loaded and on the track; I think I told Mr. Tucker I had made arrangements to deliver these cattle to the Frisco at Ft. Worth, and do not remember that he offered to ship them from Strawn to Ft. Worth on the local rate and let me deliver them but if he had offered to do so I would not have accepted it; these cattle were in fairly good condition, about like cattle usually are at that time of the year; none of them were fat; they ought to have been strong, for we had fed them cake enough; we cut back the weak cattle at the pasture; we did not assort the cattle at the time we loaded them, just loaded them altogether.

Cross-examination of behalf of St. L. & S. F. R. R. Co.:

I wanted the agent to ship these cattle from Strawn to Tulsa, turning them over to the Frisco railroad at Ft. Worth; he said he would not do it.

Recross-examination on behalf of T. & P. Ry. Co.:

I do not remember whether he said he could not do it, or would not do it, but at any rate he did not do it.

Redirect examination:

I was asking for a through shipment to Tulsa; I did not pay any attention to the rate; I told him I wanted them billed through to Tulsa; if he said anything about routing them via Sherman, I did not hear it.

Recross-examination on behalf of T. & P. Ry. Co.:

He might have said he could route them via Sherman, but I did not hear it.

Plaintiffs rested.

86 J. M. TUCKER.

J. M. Tucker, a witness for defendant T. & P. Ry. Co., testified: My name is J. M. Tucker; I live at Strawn, and lived there in April, 1902; at that time I was agent for the Texas & Pacific Ry. Co.; I remember the shipment of cattle in controversy; somewhere about 5 or 6 o'clock in the evening, after most of the cattle were loaded, there came up a controversy about the routing of the cattle; Mr. Eastin insisted that I should route the cattle via way of Ft. Worth and the Frisco; I told him I had no authority whatever to route the cattle by way of Ft. Worth and the Frisco, and that if the Frisco was doing business in Ft. Worth at that time I was not aware of it, or had not received any notice from the Texas & Pacific Ry. Co. or the officials of the Company in reference to the matter, and that the only thing I could do would be to give him a local rate to Ft. Worth, and after he got to Ft. Worth, if he saw fit, he could turn them over to the Frisco or to any other line he wished, giving him only the local rate and contract to Ft. Worth, or in order to give him through billing and through contract from Strawn, Texas, to Tulsa, I could route the cattle via Paris or Sherman; he talked over the matter and said that he had shipped cattle by way of Ft. Worth and the Frisco, and was satisfied that arrangements had been made to accept these cattle at Ft. Worth, but if such arrangement had been made I had never been notified of it, and I told him all of those facts; we were five or ten minutes talking the matter over, and when I got to the office, in order to satisfy myself I called up the chief dispatcher at Ft. Worth and asked him if he knew of any arrangement by which these cattle could be routed by way of Ft. Worth and the Frisco, and he said he did not; I then told Mr. Eastin that having no authority whatever to bill cattle by way of Ft. Worth and the Frisco, I could

not do it, but if he wanted the cattle billed that way I could
87 give him local billing into Ft. Worth, and he could then turn the cattle over to the Frisco at Ft. Worth, and that the difference could be settled in the future; he refused that offer, stating that in order to get through billing and the through rate, he preferred for the cattle to go over the Frisco; I then told him I could route the cattle by way of Paris or Sherman; he studied about it for a half minute or so, and said "all right, let them go by way of Paris;" we then signed the contracts and the cattle went out; he would not accept my proposition to give him the local rate from Strawn to Ft. Worth, but told me to let them go via Paris, and I billed them that way; I had no authority at that time to bill the cattle otherwise than by Paris or Sherman; these were stock cattle, seemingly they were poor and weak; they were in bad condition; I judged that they had been poorly wintered; in loading the cattle the shipper attended to the classifying, and we fixed the chute, placed the cars and things of that kind; the cattle were loaded indiscriminately, cows, calves, steers, yearlings, etc., loaded together; I was not informed by the plaintiffs at that time that any of the cows were with calf; I did not know and was not informed in any way, that the cows were in that condition; I have been working for the Texas & Pacific Ry. Co. for about 23 years; during the past three or four years my experience in loading and shipping cattle has been very extensive; previous to that time it was not so extensive; my experience has taught me that in order to get cattle loaded to the best advantage for shipment, they should be classified, that is the poor and weak cattle kept to themselves and those that are stronger and in better condition kept to themselves; if the cattle are loaded together the strong cattle get the advantage of the weaker cattle and get them down, and when they get down and are tramped upon it is almost impossible to get them up again in good condition; generally the result is that the cattle are tramped upon, their ribs and legs broken, and they are in
88 bad shape generally; the only safe way to ship cattle is to classify them.

Cross-examination on behalf of plaintiffs:

The controversy about the routing of the shipment came up at the crossing just east of the depot; I was at the pens all along during the evening while they were loading the cattle; when I spoke to Capt. Eastin about the matter I told him the cattle had been routed by way of Paris, but that I could change the routing and make it by way of Sherman or Paris, if he so desired, but that I could not route them by way of Ft. Worth and give him through billing; they objected to the shipment going by Paris, because they wanted it to go by way of Ft. Worth; I do not know why he wanted them to go by way of Ft. Worth; he might have said to me that that was the most direct line; it might have been the most direct line, but having no authority to route them that way I could not do it; I knew that the line from Ft. Worth to Tulsa via Sherman was more direct than the line via Paris; if the shipment had been delivered to the Frisco at Sherman, that would have been just as direct a route to Tulsa as

if they had been delivered to the Frisco at Ft. Worth; Mr. Eastin was the shipper, and he had the choice of the two routes; I did not think it necessary to explain to him that if the cattle were delivered to the Frisco at Sherman they would be carried over as direct a route as if they were delivered to the Frisco at Ft. Worth, because I thought he knew where Tulsa was, and he had the choice of either Sherman or Paris; it is not a fact that the T. & P. would get more freight by routing the shipment via Paris than it would get by routing it via Sherman; I think its proportion of the freight would be about the same if routed via either place; on April 22nd., to the best of my knowledge, the rate from Strawn to Tulsa was $57.50 per car; (the witness was shown some papers, which he identified as the contracts of shipment in question); in giving these through rates the
89 proportion of the freight going to each line is not shown; in making out the contracts I first wrote "via Ft. Worth," and it was afterwards scratched out; that was an error; I do not know what proportion of the rate of $57.50 per car the T. & P. received, the cattle going via Paris, and I cannot figure out its proportion; that is done in the general office, and I do not know anything about it.

(The contracts of shipment referred to were offered in evidence by defendant, T. & P. Ry. Co.)

When Captain Eastin spoke to me about billing these cattle I told him they had already been billed via Paris; I billed them via Paris without consulting him; I told him, however, that I could change the routing, and make it via Sherman; I think Mr. Chase ordered these cars five, six or seven days before they brought the cattle in; he ordered the cars to be shipped by way of Ft. Worth to Tulsa; if he said anything about the Frisco at that time, I do not remember it; I will not say he did not say he wanted them shipped via the Frisco from Ft. Worth; he possibly said it, but if he said anything about wanting them shipped by way of Ft. Worth and the Frisco, I did not understand him; I did not make him sign a written order; I have not got the written memorandum of the order, nor have I a copy of it; I have not seen it since I ordered the cars; if at the time Mr. Chase ordered the cars anything came up about the routing of the cattle, I do not remember it; he merely placed an order for 18 cars, to be loaded to Tulsa, I. T., by way of Ft. Worth, and if he mentioned the Frisco, I do not remember it; I possibly might have ordered the cars for Tulsa by way of Ft. Worth; in fact, we order all of our cars to be loaded by way of Ft. Worth—Ft. Worth and M. K. & T., Ft. Worth and Trans-Continental Division or Ft. Worth and Eastern Division, or Ft. Worth and any road that is doing business with the T. & P.; if at that time the Frisco was doing business with the T. & P. at Ft. Worth, I had no knowledge of it; it is my best recollection that at the time I was talking to Capt.
90 Eastin at the crossing, Mr. Stewart was present; if Mr. Chase was present at that time I do not remember it; it is possible that he was there, in fact, Mr. Chase had very little to say about the routing of the cattle, or anything else; if Mr. Chase said, sending the cattle around by Paris and Monette was like sending them around

the world, I did not understand it; he might have talked to Capt. Eastin about the matter, but he did not say anything to me about it. In talking to me he did not object to sending the cattle around by Monette; Capt. Eastin insisted all the time that the cattle be shipped by way of Ft. Worth, but he never did object to sending the cattle by way of Paris; he did not say he did not want them to go via Paris; he did not say to me if that was the only way they could be shipped they would have to go that way; in the conversation at the crossing he said he wanted the cattle to go by way of Ft. Worth and the Frisco, and after I told him I did not have any authority to make a through bill of lading and through contracts by way of Ft. Worth and the Frisco, but that I could route him by way of Paris or Sherman, or give him local billing into Ft. Worth, he told me to go ahead and route them by way of Paris; he did not subsequently tell me that if the cattle could only be shipped by way of Paris they would have to go that way; if he said that, or substantially that, I did not have any knowledge of it; I do not remember that he said anything of that kind during the conversation at the crossing.

Redirect examination:

Capt. Eastin made no objection at all to signing the contracts.

Cross-examination on behalf of St. L. & S. F. R. R. Co.:

I was present and heard Mr. Chase's testimony in this case; when an order is placed for cars to be shipped to a certain place, I generally try to locate the place and see if there is a railroad running into it. I do not remember what I consulted at the time Mr. Chase ordered these cars, to locate Tulsa; we generally have some pamphlet,
91 or something of the kind around, that shows whether or not there is a railroad at the place; when a shipment is offered to us, I am in the habit of consulting the division sheet, that is, the rate sheet, and I am governed by that; as agent of the T. & P. Ry. Co. I have other authority than the division sheet, that is, we have a book called "Circular A90," which gives the routing over each line; it gives the routing on all connecting lines in Texas and out of Texas, over which we have through billing; that circular is issued by Mr. R. Fenby, Auditor of the T. & P. Ry. Co., whose office is at Dallas; I haven't one of the circulars with me; this circular is supposed to be our authority for routing; it is issued strictly for routing purposes; I have no authority to do anything except to follow that circular; sometimes there is an amendment to the circular, but it goes as a part of the original circular; when this shipment of cattle was offered to me on April 22, 1902, I consulted the division sheet. I found that the rate was $57.50 per car, that is, the through rate from Strawn to Tulsa, and I found the routing to be by way of Paris or Sherman; I think this routing applied to all stations in Texas on the line of the T. & P. for points on the line of the Frisco; if it said for points on the line of the Frisco south of Monette, I did not know it; I came to the conclusion that I could route these cattle via either Sherman or Paris, by first ascertaining that Tulsa was on the line

of the Frisco; I then turned to this routing circular and found that shipments from all stations on the line of the T. & P. in Texas for points on the line of the Frisco, could be routed via either Sherman or Paris: the circular giving that routing was in force in April, 1902; I haven't the circular with me, but I think it can be found; I do not know, nor do I believe it to be a fact, that the circular says that shipments from Strawn to Tulsa on the Red River Division of the Frisco shall be delivered to the Frisco at Sherman; a
92 shipment from Strawn to Tulsa can be delivered to the Frisco at either Paris or Sherman at the option of the shipper; if the shipper had requested me to route these cattle via Paris, but according to my routing instructions, cattle destined to that point had to go via Sherman, I would not have violated the rules of the company in order to accommodate the shipper; in this instance I routed the cattle via Paris because the routing instructions were to route the cattle via either Paris or Sherman at the option of the shipper, and the shipper said to route them by way of Paris; the division sheet did not show whether the shipment was to be routed by way of Sherman or by way of Paris; it gave through billing at $57.50 per car either by way of Sherman or Paris; the division sheet is the only thing we have in reference to rates, but does not give the routing of the shipment; the division sheet does not show where the rate breaks; if the T. & P. and Frisco, or any other line, combine and issue a through rate, they give you a through tariff, but don't show each line's proportion in it; these cattle were not offered to the Frisco at Ft. Worth or at Sherman; they were not billed via either place, but were billed via Paris under the instructions of the shipper.

The witness was shown a map and located several places referred to.

A. J. BIARD.

A. J. BAIRD, a witness for defendant T. & P. Ry. Co. testified: My name is A. J. Baird; I live at Dallas; I am a clerk in the accounting department of the Texas & Pacific Ry. Co. which department has charge of issuing instructions to agents and connecting lines concerning the routing of shipments going from the T. & P. to other railroads; on April 22, 1902, we had through billing by either Sherman or Paris on shipments going from Strawn, Texas, to the St. Louis & San Francisco Railroad Co.; the St. Louis & San Francisco
93 R. R. Co. had joined with the T. & P. Ry. Co. in making that routing; at that time the agent at Strawn did not have authority to route cattle any other way than by Sherman or Paris. I have here the instructions to agents and connections, which shows that such shipments were to be routed by either Paris or Sherman; it is on page 22 of this circular; that is the routing and instructions that were agreed to by the St. Louis & San Francisco Railroad Co.; it is called "Circular A-90" Billing Instructions," issued by R. Fenby, Auditor of the Texas & Pacific Ry. Co.; at the time the shipment in question was made, the agent at Strawn had no authority to give through billing or through rates over the Frisco from Ft. Worth on.

"Circular A-90" Introduced.

Defendant T. & P. Ry. Co. offered in evidence the circular referred to.

Cross-examination on behalf of defendant St. L. & S. F. R. R. Co.:

This is simply an instruction by the T. & P. Ry. Co. to its agents; it is not an agreement between any Companies or anybody else, but it has been agreed to by the connecting lines; it is merely an *Ex Parte* arrangement of ours with our agents; in April, 1902, there was no agreement between the Texas & Pacific Ry. Co. and the Frisco system as to the routing of cattle and division of rates from points on the Texas & Pacific destined to points on the Red River Division and Oklahoma Division of the Frisco system, that is, no instructions were issued to that effect in connection with our department; I do not know anything about a traffic agreement to that effect; there was no routing and division agreement between the T. & P. and the Frisco, so far as I know; the accounting department of the Texas & Pacific Ry. Co. had a sheet similar to the one now shown me; I would call it a percentage sheet between the T. & P. and the Frisco for the year 1898; the other sheet to which my attention is called
94 was issued May 7, 1901; the handling, shipping and routing of stock is covered by instruments similar to the one I have here, issued by the traffic department.

Cross-examination on behalf of plaintiff:

The agent at Strawn, under his instructions, was compelled to ship these cattle to Sherman or Paris on through billing arrangements, without regard to the interests and convenience of the shipper; in a case of this kind the routing of the shipment is not made by my department, it is made by the T. & P. Road; the instructions which I have here are issued by the accounting department, but the routings are made according to percentage sheets issued by the traffic department; a division sheet shows the division between two or more lines, giving each line its proportion of the through rate; a routing sheet is instructions showing routings; if the shipper in this instance had desired these cattle shipped to Ft. Worth and turned over to the Frisco, the agent at Strawn could have done it, but not on through billing; when I refer to through billing, I mean billed through on the through rate; the agent could have billed the cattle to Ft. Worth, to be delivered to the Frisco there and taken by that road to Tulsa, but in order to do that he would have had to bill them locally—could not have given through billing for the shipment; they would have had to be billed to Ft. Worth at the local rate and re-billed from there; they could have been consigned to the Frisco railroad at Ft. Worth on local billing, at the local rate.

Redirect examination:

The Frisco R. R. Co. had agreed to this routing instruction; all of these routing instructions in connection with the Frisco, were

agreed to by the Frisco R. R. Co. before we issued the instructions to our agents, that is, they were agreed to by the Auditor of the Frisco; it is not a circular issued by the two roads jointly; the agreement between the two roads was made by correspondence; by duties
95 in my department required me to know that the Frisco auditing department had agreed to these instructions before we sent them out, and we had ascertained that the Frisco had agreed to them before we did send them out.

Recross-examination on behalf of St. L. & S. F. R. R. Co.:

We secured this agreement by either taking it up with the other road by letter, or the request comes from the other road; after the agreement is made we issue a circular which goes into the hands of both roads; a copy of this circular went to the Frisco; there cannot be through billing without through rates and divisions; the circular instructions to our agents, which I mentioned a while ago, are not instructions to a connecting line's agents; the sheet shown me a while ago signed by Mr. Sargent and Mr. Russell, is the kind of sheet that is put in possession of both roads.

Redirect examination:

When we issued this routing circular, A-90, we sent a copy of it to the Frisco; I suppose they issued a similar circular to their agents.

L. A. Edmonson.

L. A. Edmonson, a witness for defendant T. & P. Ry. Co., testified: My name is L. A. Edmonson; In April, 1902, I lived at Strawn; at that time I was working for the Texas & Pacific Ry. Co. as station helper; I know Mr. Tucker and Mr. Eastin; I was present at the time of the making of the contract for the shipment of the cattle in controversy. (The witness was shown some papers which he identified as the contract referred to.) I think I was present at the time the contracts were signed by Mr. Eastin, and I saw him sign them; he did not object to signing them.

Cross-examination on behalf of Plaintiffs:

I saw Mr. Eastin sign these contracts; I heard him talking about shipping the cattle; he at first objected to the cattle going
96 around by Paris, but afterwards agreed to let them go that way; he did not kick vigorously about them going around by Paris; I do not remember hearing Mr. Chase say that he had shipped cattle that way before, and that if they went that way it would be the same as going around the world; I heard Mr. Eastin say he had shipped cattle that way before, and that it was a long route, but that he would let these cattle go that way before he would let them go to Ft. Worth and be delivered to the Frisco there; he claimed the Frisco was at Ft. Worth and would receive them there, or something like that; Mr. Tucker wanted to bill the cattle locally to Ft. Worth, and let him re-bill them out of there, but Mr. Eastin would not do it; Mr. Tucker did not offer to ship the cattle to Ft.

Worth to the Frisco, because the Frisco did not do any business at Ft. Worth at that time; I do not remember which way Mr. Eastin wanted the cattle to go; I do not remember where I was when Mr. Eastin first talked about the matter, as it has been a long while since then; I did not hear all of the conversation between them; I heard just about what I have stated; I was in the office at the time I heard that; I do not remember whether Mr. Chase was present at that time or not; I do not remember that I heard Mr. Chase object to the cattle being routed via Paris; Mr. Eastin was the man I heard talking; I do not remember who else was present; I was busy, as we were getting ready to bill out the stock; I do not remember whether Mr. Stewart was there or not; I was present when Mr. Eastin signed the contracts; I suppose Chase and Cook signed contracts, as they had to do so in order to go with the shipment; I do not remember whether I was in the car at the time they signed the contracts or not; I was not in the car the whole time they were shipping out the cattle; part of the time I was out helping to load them; as well as I remember Mr. Eastin wanted to bill these cattle direct, and ship them by way of Ft. Worth; at that time I had been working there
97 for two and a half years; I suppose I was there when Mr. Chase ordered the eighteen cars in which to ship these cattle, but I do not remember about it; these cars arrived at Strawn sometime that morning, or about 12 o'clock; the cattle were shipped out that evening; Mr. Tucker did not tell me before Eastin and Knox got there with the cattle, that they wanted the cattle shipped via Ft. Worth and delivered to the Frisco there; I do not remember whether I saw Mr. Tucker fill out the contracts or not; I made the way bills for the stock; I do not know why the contracts were originally made out "via Ft. Worth," and then that scratched out and "Paris" substituted; I do not remember hearing Mr. Eastin tell Mr. Tucker that if these cattle could not be shipped any other way than around by Paris he reckoned he would have to take it, or something of that kind; Mr. Eastin wanted to ship his cattle by way of Ft. Worth, to be delivered to the Frisco at that point, and Mr. Tucker told him that he could not ship the cattle that way, that at that time the Frisco did not receive live stock at Ft. Worth, but that he would bill the cattle locally to Ft. Worth; I suppose he told Mr. Eastin if the cattle were billed through they would have to go via Paris, but I do not remember hearing him tell him that; he offered to bill the cattle to Ft. Worth on the local rate; I do not believe he would have consigned the cattle to the Frisco at Ft. Worth—would have consigned them to Eastin & Knox.

Redirect examination:

I do not remember that any other points besides Ft. Worth and Paris were mentioned.

J. M. TUCKER, Recalled.

J. M. TUCKER, recalled, testified: In writing up stock contracts I had been in the habit of routing the shipments by way of Ft. Worth and the Rock Island, or other roads, and through an over-

sight I wrote "Ft. Worth" in these contracts, instead of
98 writing "Paris"; in looking over the contracts I discovered that I had made the mistake; I also made the mistake of writing "Ft. Worth" in the return pass clause of the contract, and I wired the agent at Ft. Worth to change it and insert "Paris" instead of "Ft. Worth" and he did so.

Cross-examination on behalf of plaintiffs:

The agent at Ft. Worth, under my instructions, changed the contract, making it read "Paris" instead of "Ft. Worth"; I suppose Mr. Chase and Mr. Eastin knew of the change in the contract, as they had the contract. When I met Mr. Eastin at the railroad crossing I told him the cattle had been billed by way of Paris, but that I could change it; Mr. Chase might have been present at that time, I do not remember; he might have come up during the conversation; they insisted that the cattle be shipped via. Ft. Worth and the Frisco, and I told them it could not be done, giving them through billing and through bill of lading; Mr. Eastin did not then say, in substance, that if the cattle could not be shipped any other way than by way of Paris, it could not be helped, and he would have to accept it; he did not have the "any other way" in it; he said if the cattle could not be shipped by way of Ft. Worth and the Frisco and be given a through bill of lading, to go ahead and ship them by way of Paris; he might have turned around to Chase and said: "Well, if they can't be shipped any other way, we will have to let them go by Paris," but if he said anything like that in my presence, I did not so understand it; I was present there, but if he said that, I did not notice it, because I had no authority to route them by way of Sherman or Paris.

Defendant T. & P. Ry. Co. rested.

EASTIN, Recalled.

EASTIN, recalled, testified: After discussing the matter of the routing of these cattle for some time, I said to Mr. Chase, in the presence of Mr. Tucker, in substance, that I would consent
99 to ship them that way if that was all that we could do.

F. CHASE, Recalled.

F. CHASE, recalled, testified: After we had this talk at the crossing about the routing of the cattle, and Mr. Tucker had said that he was not going to route them the way we wanted them to go, and that Paris was the only route he would give us, Mr. Eastin turned to me, in the presence of Mr. Tucker, and said: "Well, what can we do about it?" I said: "There is nothing left for us to do; the cattle are loaded or practically loaded, and I do not see anything left to do except to let them go"; and he said, "It looks that way to me"; that is about the substance of the conversation.

Circular No. A-90—Billing Instructions.

The Texas & Pacific Railway Company introduced in evidence the following part of page 22 of Circular No. A-90, being the same instrument referred to by the witness Biard, as "Circular A-90, Billing Instructions," which reads as follows:

Through Billing from the T. & P. Ry. to Foreign Roads.

Series.	No. of copies.	From—	Road.	To stations.
F	2	All Stations in Texas.	St. L. & S. F. R. R.	All Stations.

Kind of freight.	Route.	Remarks.
All Freight	Paris.	When rates are combinations of locals, way-bill to Paris in local series.

Live Stock Contract.

The defendant, The Texas & Pacific Railway Company introduced in evidence the following Live Stock contracts, upon which the cattle in controversy were shipped:

100 The Texas & Pacific Railway Company.

Live Stock Contract, Limiting the Liabilities of Carriers.

No. of cars.	Initials.	No. of head.	Way-bill series.	Number.
10078	N. E. C.	35	F	1
3768	S. W. S.	39	"	2
1555	"	39	"	3
1248	"	35	"	4
2298	"	41	"	5
5190	H. S. C.	47	"	6
52394	A. T. S. F.	41	"	7
1108	S. J. B J C.	35	"	8
5950	N. E. C.	43	"	9
Mar	L. S. L. & C.	355		

Valuation not to exceed each steer..... $30.00
" cow..... 20.00
" calf.. ..... 8.00

Live Stock Contract Executed at Strawn, Texas, Station, April 22, 1902.

This agreement made between The Texas & Pacific Railway Company, of the first part, and Eastin & Knox of the second part, Witnesseth, that for the considerations and the mutual covenants

and conditions herein contained, the said first party will transport for the said second party, the live stock described below, the parties in charge thereof, as hereinafter provided, viz: 9 cars, said to contain 355 head of stock cattle, more or less from Strawn, Texas, station, to Paris, Texas, station, consigned to Eastin & Knox, Tulsa, I. T., at the rate of $57.50 per car, said rate being less than the rate charged for shipments transported at carrier's risk, and in consideration of said reduced rate and other considerations, it is mutually agreed between the parties hereto as follows:

First. That the live stock covered by this contract is not to be transported within any specified time nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempt from liability for loss or damage arising from derailments, collision, fire, escapement from cars, heat, suffocation, overloading, crowding, maiming or other accidents or causes not arising from the negligence of the first party, and said party of the second part hereby agrees to assume, and does hereby assume, all risks of injury or loss of his stock because of their being wild, unruly, weak or maiming each other or themselves, or of heat, suffocation or other results of being crowded in the cars, or being injured or destroyed by fire, on any account whatever, and especially because of burning hay, straw or other materials used for bedding the cars or feeding the stock, or for any other purpose.

101 Third. That said second party at his own risk and expense is to take care of, feed, water and attend to said stock while the same may be in the stock yards of the first party or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said first party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents or employees as aforesaid, and in case the first party should, for any reason undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

Fourth. That the said second party, for the considerations aforesaid, hereby assumes and releases said first party from risk, injury or loss which may be sustained by reason of any delay from the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property from any source, failure of machinery or cars, injury to tracks or yards, storms, floods, escape or robbery of any of said stock, overloading cars, fright of animals or crowding one upon another, or any and all other causes, except the negligence of the said first party, and such negligence shall not be assumed, but shall be proven by the party of the second part.

Fifth. That in all cases when said first party shall furnish, for the accommodation of said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders

and deemed his employees while so engaged, and he hereby agrees to hold said first party harmless on account of their acts.

Sixth. That for the consideration aforesaid, said second party further expressly agrees that as a condition precedent to his
102 right to any damages or loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment, he will give notice in writing of his claim therefor, stating the grounds thereof, to the nearest or any other convenient local agent of said first party or to its nearest station agent or to the agent at the delivering station on the railroad which carries said stock to destination, or to the nearest or any other convenient local agent of such delivering road before said stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, and within five days after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated, and will afford a full and fair opportunity for the investigation thereof, and a failure to comply in every respect with the terms thereof shall be held to be a waiver by said second party of any such claim, and shall be a complete bar to any recovery thereof. No one except a general officer of said first party has authority to waive such notice, and he only in writing.

Seventh. The second party further agrees, for the consideration aforesaid, that in case of total loss of his said stock from any cause for which the first party shall be liable, to pay for the same the actual cash value at the time and place of shipment, but in no case to exceed the declared valuations of, if horses, ponies, geldings, mares or stallions, mules or jacks, one hundred dollars; oxen or bulls, fifty dollars; cows, steers or yearlings, thirty dollars; calves or hogs, ten dollars; sheep or goats, three dollars per head, which shall be taken and deemed as full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportions.

Eighth. This contract does not entitle the holder thereof, or any other person, to ride on any train, except for the purpose and
103 in accordance with the rules and instructions printed on the back hereof, all of which are hereby expressly accepted and agreed to be made a part of this contract.

Ninth. This contract does not entitle the holder, or other parties to ride in the cars of any train except the train in which his stock referred to is drawn or taken. Nor does it entitle him (and the party of the second part so expressly stipulates, admits and agrees) to return passage from Paris, Texas to Strawn, Texas, unless the said contract is used within 20 days from the date hereof, and shall be used by those only whose names are written herein. Nor does it entitle any person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of the same, as specified in and upon this contract (and does not include women, infants or other persons unable to do and perform the services required as expressed in this contract) to

such return passage, the object, purpose and intention of the return pass being to enable the said party of the second part hereto, or his men in charge, as expressed in contract, and no other person, to return to Strawn Texas thereon at any time within 20 days from date hereof, and not thereafter.

Tenth. For the considerations aforesaid the said second party hereby further agrees that the said persons in charge of said stock, under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever such persons shall leave the caboose car, or pass over along the cars or track, they will do so at their own risk of personal injury from any cause whatever, and that said first party shall not be required to start or stop its trains or caboose cars from the depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Eleventh. It is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be
104 transported over the roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, it being distinctly understood that the liability of the Texas & Pacific Railway Company in respect to said stock, and under this contract, is limited to its own line of railway and will cease and its part of this contract be fully performed upon delivery to its next connecting carrier of the stock, mentioned herein and receipted for hereby. The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, excepting to protect the through rate of freight named herein. It is expressly agreed, however, that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.

Twelfth. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

Thirteenth. It is also expressly understood that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressly herein, and no others are made or exist.

Fourteenth. The evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations on back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

(Signed) J. M. TUCKER,
Agent for Company.
EASTIN & KNOX, *Shipper.*
By EASTIN.

Witness:
L. O. EDMONSON.

(To be other than either signer of the contract.)

(Executed in duplicate. Read this contract carefully.)

105 *Live Stock Contract.*

The defendant, The Texas & Pacific Railway Company, introduced in evidence the following live stock contracts upon which the cattle in controversy were shipped:

The Texas & Pacific Railway Company.

Live-stock Contract, Limiting the Liability of Carriers.

No. of cars.	Initials.	No. of head.	Way-bill series.	Number
2386	H. S. C.	40	F	10
1679	C. C. C. C.	46	"	11
1530	H. S. C.	49	"	12
1418	C. C. C. C.	51	"	13
1362	H. S. C.	42	"	14
5666	N. E. C.	30	"	15
76303	R. T.	41	"	16
2886	N. E. C.	33	"	17
3853	H. S. C.	28	"	18

S. L. C. Mor. less, Valuation not to exceed each steer..... $30.00
" " cow..... 20.00
" " calf..... 8.00
" " cow ponies.. 25.00

Live Stock Contract, Executed at Strawn, Texas, Station, April 22, 1902.

This agreement made between The Texas & Pacific Railway Company, of the first part, and Eastin & Knox, of the second part, witnesseth, that for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party, the live stock described below, and the parties in charge thereof, as hereinafter provided, viz: 9 cars, said to contain 370 head of stock cattle, and 2 ponies from Strawn, Texas, station, to Paris, Texas, consigned to Eastin & Knox, Tulsa, I. T. at the rate of $57.50 per car; said rate being less than the rate charged for shipments transported at carrier's risk, and in consideration of said reduced rate and other considerations, it is mutually agreed between the parties hereto as follows:

First. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempt from liability for loss or damage arising from derailments, collision, fire, escapement from cars, heat, suffocation, overloading, crowding, maiming or other accidents or causes not arising from the negligence of the first party, and said party of the second part hereby agrees to assume,
106 and does hereby assume, all risks of injury or loss of his stock because of their being wild, unruly, weak or maiming

each other or themselves, or of heat, suffocation or other results of being crowded in the cars, or being injured or destroyed by fire, on any account whatever, and especially because of burning hay, straw or other materials used for bedding the cars or feeding the stock, or for any other purpose.

Third. That said second party at his own risk and expense is to take care of, feed water and attend to said stock while the same may be in the stock yards of the first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever and hereby covenants and agrees to hold said first party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents or employees as aforesaid, and in case the first party should, for any reason undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

Fourth. That the said second party, for the considerations aforesaid, hereby assumes and releases said first party from risk, injury or loss which may be sustained by reason of any delay from the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property from any source, failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any of said stock, overloading cars, fright of animals or crowding upon one another, or any and all other causes, except the negligence of the said first party, and such negligence shall not be assumed, but shall be proven by the party of the second part.

Fifth. That in all cases when said first party shall furnish,
107 for the accommodation of said second party, laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders and deemed his employees while so engaged, and he hereby agrees to hold said first party harmless on account of their acts.

Sixth. That for the consideration aforesaid, said second party further expressly agrees that as a condition precedent to his right to any damages or any loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment, he will give notice in writing of his claim therefor, stating the grounds thereof, to the nearest or any other convenient local agent of said first party, or to its nearest station agent or to the agent at the delivering station on the railroad which carries said stock to destination, or to the nearest or any convenient local agent of such delivering road before said stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, and within five days after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated, and will afford a full and fair opportunity for the investigation thereof, and a failure to comply in every respect with the terms thereof shall be held to be a waiver by said second party of any such claim, and shall be a complete bar to any recovery

thereof. No one except a general officer of said first party has authority to waive such notice, and he only in writing.

Seventh. The second party further agrees, for the consideration aforesaid, that in case of total loss of his said stock from any cause for which the first party shall be liable, to pay for the same the actual cash value at the time and place of shipment, but in no case to exceed the declared valuations of, if horses, ponies, geldings, mares or stallions, mules or jacks, One Hundred Dollars; oxen or bulls
108 fifty dollars; cows, steers or yearlings, thirty dollars; calves or hogs, ten dollars; sheep or goats, three dollars per head, which shall be taken and deemed as full compensation therefor, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportions.

Eighth. This contract does not entitle the holder thereof, or any other person, to ride on any train, except for the purpose and in accordance with the rules and instructions printed on the back hereof, all of which are hereby expressly accepted and agreed to be made a part of this contract.

Ninth. This contract does not entitle the holder, or other parties, to ride in the cars of any train except the train in which the stock referred to is drawn or taken. Nor does it entitle him (and the party of the second part so expressly stipulates, admits and agrees) to return passage from Paris, Texas to Strawn, unless the said contract is used within 20 days from the date hereof, and shall be used by those only whose names are written herein. Nor does it entitle any person except the party of the second part and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of same, as specified in and upon this contract (and does not include women, infants or other persons unable to do and perform the services required as expressed in this contract) to such return passage, the object, purpose and intention of the return pass being to enable the said party of the second part hereto, or his men in charge, as expressed in contract, and no other person, to return to Strawn, Texas, thereon at any time within 20 days from date hereof, and not thereafter.

Tenth. For the considerations aforesaid the said second party hereby further agrees that the said persons in charge of said stock, under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that *that* whenever
109 such persons shall leave the caboose car, or pass over along the cars or track, they will do so at their own risk of personal injury from any cause whatever, and that said first party shall not be required to start or stop its trains or caboose cars from the depots or platforms, or to furnish lights for the accommodation or safety of such persons.

Eleventh. It is fu:ther stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, it being distinctly under-

stood that the liability of the Texas & Pacific Railway Company in respect to said stock, and under this contract, is limited to its own line of railway and will cease and its part of this contract be fully performed upon delivery to its next connecting carrier of the stock mentioned herein and receipted for hereby. The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything in connection with said stock beyond its own line of road, excepting to protect the through rate of freight named herein. It is expressly agreed, however, that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.

Twelfth. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

Thirteenth. It is also expressly understood that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressed herein, and no others are made or exist.

110 Fourteenth. The evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the printed rules and regulations on back thereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

(Signed) J. M. TUCKER,
Agent for Company.
EASTIN & KNOX, *Shippers*,
By EASTIN.

Witness:
L. O. EDMONSON.

(To be other than either signer of the contract.)

Executed in duplicate. Read this contract carefully.

H. C. Brashier.

H. C. Brashier, a witness for defendant St. L. & S. F. R. R. Co., testified: My name is H. C. Brashier; I reside at Ft. Worth; I am chief clerk of the freight office of the St. Louis & San Francisco R. R. Co. in Texas and the Ft. Worth & Rio Grande R. R. Co.; I have held that position for about five years; the distance from Strawn, Texas, to Ft. Worth, Texas, via the T. & P. Railway is 81 miles; the distance from Ft. Worth to Sherman via the Red River, Texas & Southern, or Frisco, is 90 miles; the distance from Ft. Worth to Sherman via the Trans-Continental branch of the T. & P. is about 90 miles; the distance from Sherman, Texas, to Tulsa, I. T., via the Frisco is 221 miles; this makes the total distance from Strawn, Texas, to Tulsa, I. T. about 392 miles; the distance from Sherman to Paris via the Trans-Continental branch of the T. & P. is 63 miles, I think; the distance from Paris, Texas to Tulsa, I. T. via the Frisco

and Monette, is 444 miles; the distance from Strawn to Tulsa, via Ft. Worth, Sherman, Paris and Monette, is 678 miles; if this shipment had gone over the Iron Mountain via Ft. Smith and Claremore, it would have lessened the distance about 130 miles, I think; the cattle were not shipped by that route because the Frisco had no arrangements with the Iron Mountain for division of rev-
111 enue, which would have been necessary in order to get through billing and protect the through rate; the contract of shipment does not call for any special route from Paris to Tulsa; it calls for a rate from Strawn to Tulsa; the shipment was destined to a point on the Frisco, and it could not have gone from Ft. Smith to Claremore via the Iron Mountain, and the through rate have been protected; the Frisco's connection at Paris is the Paris and Great Northern, which extends from Paris, Texas, to the Red River, about eleven miles; the St. Louis & San Francisco R. R. coming towards Texas stops at the Red River; the Paris and Great Northern is a Texas corporation, chartered as such; it is officered as a railway; it has never consolidated with the Frisco, but is still operated independently and as a separate and distinct corporation; the instrument which I now have in my hand is a division or basing sheet, showing the division of revenue or division of through rate that each line is entitled to for services from and to its junction, or the junction where the freight is delivered to the other carrier; the original of this sheet was issued October 18, 1898; it is an agreement between the T. & P. Ry. Co. and the St. L. & S. F. Ry. Co.; it was issued by the general freight agents of the two roads, Mr. Sargent and Mr. Russell; the sheet is intended for general distribution among the agents, and especially the junction agents, of the two roads; it is for their government; it binds the agents of the two roads to go by the agreements contained in it; it was in force in April, 1902; so far as I know, it had not been changed from 1898 until 1902, except that from time to time there have been amendments to it; there is an amendment among the papers I have here, showing the status of the agreement in April, 1902; it is called "Amendment No. 3," was issued May 17, 1901, and was out in force on April 22, 1902; it is a sheet that was issued and sent out to all the agents along the line of the Frisco; it reads: "Stock cattle originating at points on
112 T. & P. to points on St. Louis & San Francisco in Oklahoma, on the Oklahoma and Red River divisions, south and west of Monette, Missouri, route via Sherman, Texas;" Tulsa is on the Oklahoma division; under this agreement a shipment of cattle destined to Tulsa should move by Sherman; this sheet does not authorize the shipment of cattle from Strawn Texas, on the line of the T. & P., to Tulsa, I. T., on the line of the Frisco, via any other point than Sherman; it does not authorize the shipment of cattle via Paris; these cattle were not offered to the Frisco at Ft. Worth or Sherman, so far as I know; The Red River, Texas & Southern commenced to operate between Ft. Worth & Sherman on March 23, 1902; if these cattle had been presented to us at Ft. Worth on the 23rd. of April, we probably would have accepted them, but not on through rate at

that point; we would not have accepted them on through rate, because we had no arrangements for any division of the revenue with the T. & P.; the arrangement we had at that time was via Sherman, under the agreement I have here; if the T. & P. had offered the cattle to us at Ft. Worth, we could have compelled them to deliver them to us at Sherman; this is an agreement between the traffic officials of the two roads as to the division of the revenue; prior to April 22, 1902 the Red River, Texas & Southern received cattle shipments at Ft. Worth from the Rio Grande, some from the Santa Fe, some from the Denver and some from the Rock Island; at that time an agreement had been made with those roads as to the division of the revenue, but had not been made with the T. & P. Ry. Co.; an agreement was not made with the T. & P. until May 1, 1902, by which the Red River, Texas & Southern would receive cattle from it at Ft. Worth; that was some five or six days after the shipment in question; at the time of the shipment in question I do not think there was any agreement in existence between the T. & P. and the Frisco as to the handling of shipments of cattle between the points re-
113 ferred to, except the one I have in my hand; this is a contract between the two roads which the agents had to respect in all shipments; it is for the guidance of the agent; it is an instruction by both the T. & P. and the Frisco to their agents.

Cross-examination on behalf of the T. & P. Ry. Co.:

The Frisco agent at Paris might have accepted this shipment without having authority to do so for two reasons; first, if he had not accepted it, it would have entailed a backhaul for the T. & P.; the second reason is that he had a partial arrangement, or could have divided it, according to this division sheet, at a straight mileage pro rate; rather than turn the shipment back, he could have worked it out that way, which he did; at that time there was a kind of agreement to that effect. It is something like 120 miles from Ft. Smith to Claremore, over the Iron Mountain; it is about 140 miles from Ft. Smith to Monette, over the Frisco, and about 60 miles from Monette to Claremore. Mr. C. Griffith is the superintendent of the Paris & Great Northern R. R.; on April 23, 1902, he was not acting as agent for the St. Louis & San Francisco R. R. Co. at Paris, Texas; at that time he had through billing arrangements by which he could handle stuff going over the Frisco, the same as he could handle that going over any other line; he did not represent the St. L. & S. F. R. R. Co in handling those shipments; he was the Paris & Great Northern man; there is no agent at the river to handle the Frisco shipments; the agent of the Paris & Great Northern had through billing arrangements whereby he could bill through to points on the Frisco; I do not know that the shipments were checked at the river when received by the Frisco; the first station beyond the river received the shipments for the Frisco, but I do not know that the shipment stopped there; I do not know whether the law requires a railway company to receive the shipments at the state line or not; the

joint agent at Paris made out the contracts for the shipment
114 of stuff over the St. L. & S. F., but I should say that he did not represent the St. L. & S. F. in making out the contracts; he made them out as agent of the P. & G. N., and the P. & G. N. contract carried liability to destination; I do not know whether it is or is not a fact that the same train, engine, crew, etc., that started out of Paris with these cattle carried them to the end of that division of the St. Louis & San Francisco R. R. Co.; I know that the Frisco runs its cars through to Paris; I do not know that the same trains carry them out of there, as I was never at Paris.

Redirect examination:

The reason that the distance could not be shortened in this instance was that the Frisco had no agreement with the Iron Mountain by which the rates could be preserved, and for that reason it had to take the cattle around by Monette, as it did.

Recross-examination on behalf of the T. & P. Ry. Co.:

We did not try to make any arrangements with the Iron Mountain by which these cattle could have been shipped over that road.

Cross-examination on behalf of plaintiffs:

I heard the station clerk, Edmonson, testify that he made out the way-bills for the shipment of these cattle; a way bill is supposed to show the point of origin and destination, date shipment left station, routing, name of consignor and consignee, articles loaded in car, weight, rate and revenue; the way-bill generally goes with the car, and the agent who receives the shipment gets it at the windup; it never passes into the hands of the shipper; it goes on file in the office of the receiving agent; we have not got the way-bill that accompanied this shipment among our file papers; it should be on file at Tulsa; if these cattle had been billed to our company at Ft. Worth, we, no doubt, would have turned them down at that point, unless they had been billed to us on the local rate, and we would then have assessed the local rate from Ft. Worth, to Tulsa; if these cattle had been shipped from Strawn to Ft. Worth and then shipped from Ft.
Worth to Tulsa, they would have been shipped at what is
115 termed the local rate; the local rate from Ft. Worth to Tulsa would have been $37.40 per car; at that time the local rate from Strawn to Ft. Worth would have been about $21 per car; that would have made a total rate from Strawn to Tulsa of about $58.40 per car; the through rate was $57.50; if this had been made a local shipment, and it had been offered to us at Ft. Worth, we certainly would have accepted it; the distance from Sherman to Paris is 63 miles; from Paris to Tulsa, via Monette, it is 444 miles, which would make the distance from Sherman to Tulsa, via Paris 507 miles; from Sherman to Tulsa over the Frisco it is 221 miles.

Redirect examination:

These sheets are contracts between the traffic departments of *of* the T. & P. and the Frisco; under these contracts they would have

had to deliver these cattle to us at Sherman; the agent at Paris could have received the shipment on basis of mileage pro rate instead of causing the T. & P. a back-haul, but there was no agreement to that effect; however, the shipment could have gone, and did go, that way.

Recross-examination on behalf of plaintiffs:

I do not think it was to the interest of the T. & P. to carry this shipment beyond Sherman to Paris; I do not think they got more money out of it by doing so; they virtually carried the shipment 63 miles for nothing; they might have gotten a little more in dollars and cents, but taking into consideration the service they performed, they did not get any more.

Recross-examination on behalf of T. & P. Ry. Co.:

The T. & P. received $19.84 per car for carrying the shipment to Paris; if they had delivered it to the Frisco at Sherman, they would have received $25.07 per car.

Recross-examination on behalf of plaintiffs:

It is the factors used that causes the T. & P. to receive more by delivering the cattle at Sherman than they received by delivering them at Paris; if they had delivered them at Sherman they
116 would have performed a service of 171 miles, and the Frisco service would have been 221 miles, and they would have received more money than they did receive by delivering them at Paris; the longer haul of the T. & P. was a detriment to it; the T. & P. was not working for our interests when it hauled the cattle to Paris and gave us the benefit of the long haul; it was because they did not observe the division sheet, but I do not think they did it to serve us; every railroad tries to get the long haul where it can get it and get the revenue; the principal object of railroads is to get the long haul; I do not know what Mr. Tucker's object was in routing these cattle via Paris; I do not think his object was to get the long haul; I think it was an error on his part; the shipment should have gone via Sherman, and I think he simply committed an error in routing them via Paris; I do not think his object in committing the error was to get the long haul for his road; this sheet should have been in Mr. Tucker's hands.

The St. Louis & San Francisco R. R. Co. introduced in evidence the instruments referred to.

Basing Sheet.

Introduced by the Frisco.

The St. Louis & San Francisco Railroad Company introduced in evidence the following instrument, being the same instrument referred to by the witness H. C. Brashier, which is as follows:

117 (First Page.)

(Frisco Line.)

St. Louis & San Francisco Railroad Co.

The Texas & Pacific Railway Company.

General Freight Department.

Amendment No. 3.

(Cancels Supplement H.)

To

Basing Sheet No. 252,

Showing Basis for Division of Rates Applying on Business

Between

St. Louis, Kansas City, Mo., and Points in Their Respective Territories

and

All Stations on the Texas & Pacific Railway,

Via Routes Shown.

Issued May 17, 1901. Effective as Noted Within.

F. D. RUSSELL,
G. F. A., St. L. & S. F. R. R., St. Louis, Mo.

E. L. SARGENT,
G. F. A., T. & P. Ry., Dallas, Texas.

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(Second Page.)

Effective April 3, 1901.

Interstate Divisions.

The following will govern in the division of all through rates unless otherwise provided herein.

Via Sherman, Texas.

Item No.	Between following points on St. L. & S. F. R. R., on Okla. & Red River Div's in Indian & Okla. Territories.	And following points on Texas & P. Ry.	Per cents.	
			Frisco.	T. & P.
1	When Kansas City rate is applied.	All Points in Texas.	Same per cents as via Paris. (See basing sheet proper.)	
2	Competitive points taking less than K. C. Rates.	Competitive points on T. & P. Ry.	Straight mileage prorate (with minimum of 25% to either line.)	
	Local Points taking less than Kansas City rates.	Local points on T. & P. Ry.		
3	Local points taking less than K. C. rates.			
	Competitive points taking less than K. C. Rates.	Competitive points on T. & P. Ry. Local points on T. & P. Ry.	Mileage prorate, allowing line having haul from or to local points 1½ mile for each mile (with a minimum of 25 per cent.)	
4	Stations Wyandotte, I. T. and West to Okla. City, O. T. and Gray, I. T. inclusive.	New Orleans, La....	50	50

Stock Cattle, C. L.

On—	From—	To—	
Stock Cattle, C. L.	T. & P. Points.	St. L. & S. F. points on Okla. & Red River Div's, South & West of Monette, Mo. (Via Sherman, Texas.) On Texas Division, Monette, Mo., and South. (Via Paris, Texas.) Mo. Pac. & St. L. I. M. & S. points. (Via Paris, Frisco, Ft. Smith & St. L. I. M. & S. Ry.)	Straight mileage prorate, with a minimum of $15.00 per car, North or South of Paris or Sherman, provided that when such proportion will not permit allowance of such minimum to each line, divisions will be made half and half.

Effective April 20, 1901. Refer to above basing sheet and add the following: In dividing rates on Tropical fruits and cocoanuts, from New Orleans, La., a terminal charge to cover wharfage, fruit, shed or dravage charge, of 1½ cents per 100 pounds, minimum 20,000 pounds per car, when in car loads, and 1½ cts. per 100 pounds, actual weight when in L. C. L. will be deducted before prorating and shown separately on way-bill.

Effective March 17, 1901. Refer to Amendment No. 1 and cance-, special divisions shown therein on compress cotton, round and square bale cotton. For divisions see Item No. 5, page 7, in effect prior to January 25, 1901.

119 I, J. W. Patterson, Judge of the 43rd. Judicial District, hereby certify that the parties hereto failed to agree to a statement of facts in this cause, that the parties thereto submitted to me statements of facts, and from my knowledge of the facts proved on the trial of said cause & from the statements so furnished me I have made out the foregoing statement of facts which I hereby certify to be a full and fair statement of the facts proven on the trial of said cause of Eastin & Knox *vs.* The Texas & Pacific Railway Company, *et al.*

J. W. PATTERSON,
Judge of 43rd District.

Endorsed: #3985. Eastin & Knox *vs.* J. M. Tucker *et al.* Statement of Facts. Filed Dec. 12, 1904. A. C. R. Morgan, Dist. Clerk.

Conclusions of Law and Fact.

Filed Nov. 22, 1904.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Tried in the District Court of Parker County *County*, Nov. Term, 1904.

Conclusions of facts found by the Court upon trial of said cause; 1st. I find that on the 14th. day of April, 1902 that the defendant J. M. Tucker was the agent of the defendant Texas & Pacific Railway Co. at Strawn, in Palo Pinto County, Texas, and that said Tucker is now and has ever since been the agent of defendant Texas & Pacific Ry. Co. at said station of Strawn.

2nd. I find that on or about the 18th. of April, 1902 the plaintiff applied to defendant J. M. Tucker as agent of the defendant Texas & Pacific Ry. Co. at Strawn, Texas, for 18 stock cars to be furnished at Strawn on the 22nd. of April, 1902, for the purpose of shipping

18 cars of cattle from said station of Strawn of deft.'s line of
120 R. R. to Tulsa, a station on the St. Louis & San Francisco R. R. in the Indian Territory. That the plaintiffs at the time of ordering said cars informed the defendant Tucker as agent of Texas & Pacific Ry. Co. that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Ry. Co. & from Ft. Worth, Texas, to Tulsa, I. T. over the line of the St. Louis & San Francisco Ry. Co. That said Tucker as such agent agreed to & did furnish said cars at Strawn on the 22nd. of April, 1902. That on said date the plaintiffs arrived there with their cattle, consisting of 615 head of grown cattle mostly cows and 97 calves; that on said day the cattle were all loaded on the said cars; that late in the evening of said date and after most of the cattle were loaded, the agent of defendant Texas & Pacific Ry. Co., the said J. M. Tucker, one of the defendants herein presented to S. W. Eastin, one of the plaintiffs the live stock contracts attached to the 2nd. amended original answer of the defendant Texas & Pacific R. R. for his signature, which contracts were for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T. over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco Road to Tulsa; that when said Eastin was informed that his cattle were routed by way of Paris, he objected & stated that the route was much further than by way of Ft. Worth & from there over the said St. Louis & San Francisco, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco to Tulsa, I. T.; said agent Tucker then and there informed the plaintiff Eastin that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn to Tulsa, I. T. over any other route except by its own line to Paris, & from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the
121 purpose of getting his cattle shipped, signed said contracts attached to said 2nd. amended answer of Deft. T. & P. Ry. Co.; he did this unwillingly because he thought that was the only means by which he could get his cattle shipped through from Strawn to Tulsa on through bill of lading. That the plaintiffs had no place to put their cattle if they were not shipped through to Tulsa, I. T. near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only means by which he could get his said cattle shipped through to Tulsa. The distance from Strawn, Texas to Tulsa, I. T. by way of Paris, is about six hundred miles, while to have shipped them to Ft. Worth or Sherman over the line of deft. T. & P. Road & from there on over the St. Louis & San Francisco line would have been a direct route and only about half as far as the route by way of Paris. That the defendant could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth & could have there delivered them to said St. Louis & San Francisco road, or the defend-

ant could have carried the cattle to Sherman, Texas, & there delivered them to said St. Louis & San Francisco road, as the line of the said St. Louis & San Francisco road ran into both Ft. Worth and Sherman. The distance would have been about the same to have delivered the cattle to St. Louis & San Francisco at Sherman as to have so delivered them at Ft. Worth. That at the time the defendant Texas & Pacific Ry. Co. had no arrangement with St. Louis & San Francisco for a through freight rate from Strawn to Tulsa by way of Ft. Worth, but did have such an arrangement for through freight rate by way of both Sherman & Paris. That the plaintiffs at time of said shipment did not know that they could have shipped their cattle over the Texas & Pacific Ry. Co. to Sher-
man, and from there over the St. Louis and San Francisco
122 Ry. Co. that the route by way of Sherman was as short as the one by Ft. Worth, and would have suited them, the plaintiffs, as well as the way by Ft. Worth. That said cattle after being loaded on the cars at Strawn, Texas, were carried by the defendant Texas & Pacific Ry. Co. over its line to Paris and were there delivered to the St. Louis and San Francisco road, in good condition; that the run from Strawn to Paris was made in good time, and without any improper treatment of the cattle, and with as little injury to the cattle as was possible. That after said cattle were delivered to the St. Louis & San Francisco Ry. Co. at Paris, they were put in muddy lots for feeding and watering, but the pens were in such bad condition that they could not eat or drink but little, and on that account & on account of the muddy condition of said pens the cattle were damaged and injured; the cattle were then loaded upon the cars of the St. Louis and San Francisco R. R. and carried over said line to Tulsa, I. T.; that on the way from Paris to Tulsa the cattle were side-tracked about 12 hours at night and during the time were switched around & jerked and the cars on which they were loaded were struck and knocked by other trains, and thereby the cattle in great numbers were thrown or knocked down and were unable to get up and were trampled upon and thereby skinned and bruised, and all of them injured & damaged— That the cattle were en route from Strawn to Tulsa, I. T. for 60 hours, when they should have reached Tulsa in from 20 to 30 hours had they been shipped via Sherman or Ft. Worth over the St. Louis & San Francisco to Tulsa, I. T.; that by reason of the extra time the cattle were in the cars by reason of being routed as they were, and by reason of being put in muddy lots at Paris & being side tracked & jerked, bumped, thrown down and *d*ruised as they were, which acts were negligence on the part of the R. R. Co.'s, and by reason of extra expense that the plaintiffs' cattle were greatly injured, and the plaintiffs were thereby damaged in the sum of
thirty six hundred dollars; that thereby 29 head of the
123 cattle were killed; that the cattle killed were of the value of $20.00 per head & the balance of the grown cattle were damaged five dollars per head, & this with items of reasonable and necessary expense that plaintiff incurred as charged in their petition, they were damaged in said sum of thirty-six hundred dollars,

and are entitled to judgment therefor against the defendant Tucker and the Texas & Pacific R. R. Co. That by positively refusing to route said cattle over any other route than by way of Paris when there were other ways known to him by which they could have been routed, and as he knew the plaintiffs wished them routed, he became liable to the plaintiffs.

I find that said shipping contracts were signed by the plaintiff Eastin by reason of duress and for that reason not binding on plaintiffs. That in said contracts it was stipulated that the defendant Texas and Pacific Ry. Co. should not be responsible for any damage or injury to the cattle after they left its line. I find that one half the injury & damage sustained by the cattle was on account of the extra time they were kept on the cars and by the extra distance they had to be hauled by being carried by way of Paris, and the other half was caused by the negligent handling of the cattle by the St. Louis and San Francisco road after it received the cattle as hereinbefore set out in these findings. I find that the plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that defendant Tucker knew this fact & find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle by way of Sherman, and from there to Tulsa over the St. Louis & San Francisco R. R. he would have shipped them that way, if defendant would have so done.

J. W. PATTERSON,
Judge of 43rd District.

Conclusions of Law.

The fact the the defendant Tucker, agent for the defend-
124 ant the Texas and Pacific R. R. positively refused to route the *the* cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable to all damage sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant Texas and Pacific, and the fact that it was stipulated in said shipping contracts that the defendant Texas and Pacific was not to be responsible for any injury occurring after cattle left its line will not relieve it as said contract is not binding on the plaintiffs by reason of duress. The defendant Texas and Pacific having by pleading brought the St. Louis and San Francisco in as a party, and prayed for judgment over against it, is entitled to recover of said Road the damages caused to said cattle by reason of the negligence of said St. Louis and San Francisco Ry. Company.

J. W. PATTERSON,
Judge of 43rd District.

Endorsed: No. 3985. Eastin & Knox *vs.* J. M. Tucker *et als.* Findings of Fact and Conclusions of Law. Filed Nov. 22, 1904. A. C. R. Morgan, Dist. Clerk.

Order on Exceptions of Def't Tucker.

Nov. 10, 1904.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

Nov. 10, 1904.

Now coming on to be heard the exceptions of the defendant, J. M. Tucker, to the plaintiffs' pleadings, and the Court after hearing the same, and the argument of counsel thereon, is of the opinion that the law is against the said exceptions, and with the plaintiff. It is therefore ordered that the said exceptions be and the same are hereby in all things overruled, to which the defendant J. M. Tucker excepts.

125 *Order on Exceptions of St. L. & S. F. Ry. Co.*

Nov. 10, 1904.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

Nov. 10, 1904.

Now coming on to be heard the demurrers and special exceptions of the defendant the St. Louis & San Francisco Railroad Company to the cross bill of the Texas and Pacific Railway Company, contained in its First and Second amended original answers; and the Court after hearing the same and the argument of counsel, if of the opinion that the law is against the said demurrer and exceptions and is with the Texas & Pacific Railway Company. It is therefore ordered by the Court that the said demurrers and special exceptions be, and the same are hereby in all things overruled, to which the defendant, the St. Louis & San Francisco R. R. Co. excepts.

Judgment.

Nov. 11, 1904.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

Nov. 11, 1904.

Now coming on to be heard the above numbered and entitled cause, and the plaintiffs, Eastin & Knox, a firm composed of S. W.

Eastin & D. L. Knox, appearing in their own proper persons and by counsel, and the defendant J. M. Tucker appearing in person and by counsel, and the defendant The Texas and Pacific Railway Company appearing by counsel, and the defendant, the St. Louis & San Francisco Railroad Company appearing by Counsel; and all parties announcing ready for trial, and a jury being waived, all the matters of fact as well as of law were submitted to the Court: and the court after hearing the law and the evidence and the argument of counsel, is of the opinion that the plaintiffs S. W. Eastin
126 and D. L. Knox should have and recover of and from the defendants, J. M. Tucker and The Texas and Pacific Railway Company, a body corporate, duly incorporated under the laws of the United States, their damages occasioned by the acts of the defendants in the premises.

It is therefore considered and adjudged by the Court that the said plaintiffs S. W. Eastin and D. L. Knox, do have and recover of and from the defendants, J. M. Tucker and the said The Texas & Pacific Railway Company the sum of Thirty Six Hundred Dollars ($3600.00) with interest thereon from this date at the rate of six per cent per annum until the said judgment is paid, together with all costs in this behalf expended, for which let execution issue.

And the Court being further of the opinion that the Texas & Pacific Railway Company should have and recover of and from the defendant St. Louis & San Francisco Railroad Company, it is further considered, ordered and adjudged by the Court that the defendant The Texas & Pacific Railway Company do have and recover judgment over and against and from the defendant the St. Louis & San Francisco Railroad Company in the full sum of Eighteen Hundred Dollars ($1800.00) with interest thereon at the rate of six per cent per annum from date hereof, together with its cost in this behalf incurred. And that it have its execution therefor.

It is further ordered by the Court that the officers of Court do have and recover of and from each party hereto and the sureties on their cost bonds (plaintiffs' sureties being James W. Knox and H. T. Daugherty) all costs by him or it herein incurred, for which they may have their execution. To which judgment and action of the Court the defendant, the St. Louis & San Francisco Railroad Company excepts, and in open Court gives notice of appeal to the Court of Civil Appeals for the second Supreme Judicial District of Texas at Fort Worth.

127 *Bill of Exception No. 2 of T. & P. Ry.*

Filed Dec. 12, 1904.

In the District Court of Parker County, Texas, 1904.

3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET ALS.

Be it remembered that on the trial of the above numbered and entitled cause, and while the witness Chase was on the stand testifying on behalf of plaintiffs, and after said witness had testified, among other things, as follows: "I remained at Tulsa for about six weeks after these cattle were shipped there; I had also been there previous to that time, and have been there since; I had been at Catoosa, which is just a short distance from Tulsa, about a year previous to that time with a big lot of cattle; I have not stopped off at Tulsa since the shipment in question; I have passed through there, however and have been in that vicinity; I have been staying down this side of Tulsa this year—have been there five months; I was there with cattle;" plaintiffs offered to prove by the said witness what was the market value of the cattle in controversy at Tulsa, I. T., at the time of their arrival there, and counsel for plaintiffs did ask the witness the question: "Q. What was the market value of these cattle if they had arrived there in proper condition, Mr. Chase?" To which question the defendant, The Texas & Pacific Railway Company, objected for the following reasons, viz; 1st; It did not appear and the witness had not stated that he knew the market value of the cattle at Tulsa at the time of their arrival there; 2nd; It appeared from the statements of the witness that any answer he could or might make to the question would only be the conclusion and opinion of the witness based upon what he had heard others say and what others had told him about the market value of the cattle at Tulsa at the time of their arrival there, and hence any statement he could or would make as to the market value
128 of the cattle at the time of their arrival there would be purely hearsay and inadmissible for any purpose; which objections was by the Court overruled; and the witness was permitted, over the objections of the defendant, The Texas & Pacific Railway Company, to testify as follows: "If the cattle in question had reached Tulsa in the condition in which they should have reached there, and had been treated right, they would have been worth at least $20.00 per head;" and the defendant, The Texas & Pacific Railway Company, excepted to the ruling of the Court in overruling its objections to the above question and in permitting the witness to testify as above stated, over its objections; and now excepts and herewith tenders its bill

of exceptions, and asks the same may be signed and made a part of the record in said cause, which is accordingly done.

J. W. PATTERSON, *Judge.*

Endorsed: # 3985. Eastin & Knox *vs.* J. M. Tucker *et als.* Bill of Exception No. 2 by def't T. & P. Ry. Co. Filed Dec. 12, 1904. A. C. R. Morgan, Dist. Clerk. H. C. Shropshire, Att'y for T. & P. Ry. Co.

Bill of Exception No. 3.

Filed Dec. 12, 1904.

In the District Court of Parker County, Texas, 1904.

3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET ALS.

Be it remembered that on the trial of the above numbered and entitled cause, and while the witness Eastin was on the stand testifying on behalf of Plaintiffs, and after said witness had testified, among other things, as follows: "I was not at Tulsa at the time these cattle arrived there; I do *now* know what time in May I went to Tulsa; I remained there from May until about December;" counsel for plaintiffs offered to prove by the witness what was the market value of said cattle at Tulsa at the time they arrived
129 there, and did ask the witness the question: "Q. I say from your knowledge of the cattle and knowledge of the condition of the market for stock cattle there in Tulsa, when you got there, can you state to the Court what the market value of these cattle would have been had they arrived there in the condition they should have arrived?" to which question the witness asked: "Just what I think they would be worth?" and counsel for plaintiffs stated to the witness: "Yes, sir: as a cattle man—from your knowledge and experience as a cattle man:" to which question the defendant, The Texas & Pacific Railway Company, objected for the reason, 1st. It had not been shown and the witness had not stated that he knew what the market value of the cattle was at Tulsa at the time of their arrival there; 2nd; The question sought to establish the market value of the cattle at Tulsa at the time of their arrival there by proof of the market value of the cattle at Tulsa at a time subsequent to the time of the arrival of the cattle at Tulsa; 3rd; The Question called merely for the conclusion and opinion of the witness based upon what others had told him and what he had heard others say about the market value of the cattle at Tulsa at the time of their arrival there, and hence any statement he could or would make as to the market value of the cattle at the time of their arrival there

would be purely hearsay and be inadmissible for any purpose; which objection was by the Court overruled; and the witness was permitted, over the objections of the defendant The Texas & Pacific Railway Company, to testify and state as follows: "Why, I think they would have brought $20.00;" and the defendant, The Texas & Pacific Railway Company, excepted to the ruling of the Court in overruling its objection to the above question and in permitting the witness to testify as above stated over its objection; and now excepts and herewith tenders its bill of exceptions, and asks the same may be signed and made a part of the record, in said cause, which
130 is accordingly so done.

J. W. PATTERSON, *Judge.*

Endorsed: #3985. Eastin & Knox *vs.* J. M. Tucker *et als.* Bill of Exception No. 3 by def't T. & P. Ry. Co. Filed Dec. 12, 1904. A. C. R. Morgan, Dist. Clerk.

Def't Tucker's Amended Motion for New Trial.

Filed Nov. 22, 1904.

3985.

In the District Court of Parker County, Texas, A. D. 1904.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET ALS.

Now comes J. M. Tucker, defendant in the above numbered and entitled cause, and with leave of the Court therefor first obtained, files this his first amended motion for a new trial in lieu of his original motion for a new trial filed herein on the 12th day of November, 1904, and prays the court to set aside the judgment of the Court rendered by the Court, on the trial of this case in the District Court of Parker County, Texas, on the 11th day of November, 1904, in favor of the plaintiffs and against this defendant, and his co-defendant, The Texas & Pacific Railway Company, and grant him a new trial for the following good and sufficient reasons, to-wit:

1. The judgment is contrary to law and unsupported by the evidence in this; it appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing and that in the making of said written contracts, and in the shipment of said cattle, this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle, and at the time of the shipment of said cattle, it was well known
131 to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant

was the agent of the said Texas & Pacific Railway Company, and that this defendant acted and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; and there is no evidence before the Court showing that this defendant owed plaintiffs any duty which he failed to perform.

2. The judgment is contrary to law and unsupported by the evidence in this: It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction and at the request and with the consent of plaintiffs.

3. The Court erred in its findings of fact, wherein the Court found as a fact "that the plaintiffs at the time of ordering said cars informed the defendant Tucker, as agent of the Texas & Pacific Railway Company, that they wished to ship said cattle from Strawn, to Ft. Worth, Texas, over the Texas & Pacific Railway Company's road, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company's line. That said Tucker, as such agent, agreed to and did furnish said cars at Strawn on the 22nd day of April, 1902;" because it appears from the evidence that on or about the 18th day of April, 1902, plaintiffs' agent, Mr. Chase, called upon this defendant at the depot of the Texas & Pacific Railway Company at Strawn, Texas, and only stated to this defendant that he wanted him, this defendant, to get or have 18 cars ready for the shipment of said cattle from Strawn, Texas, to Tulsa, I. T., on the 22nd day of April, 1902, and for him to order said cars via Ft. Worth, Texas, and the Frisco; that at said time nothing else was said about said cars and that nothing was said by either this defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be
132 shipped and transported, or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., and that at said time this defendant did not agree to furnish said cars for the shipment and transportation of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of the Texas & Pacific Railroad, and from Ft. Worth, over the line of the St. Louis & San Francisco Railroad Company.

4. The Court erred in the second paragraph of its findings of fact wherein the court found as a fact that late on the evening of the 22nd day of April, 1902, and after most of the cattle were loaded the agent of the defendant Texas & Pacific Railway Company, the said J. M. Tucker, one of the defendants herein, presented to S. W. Eastin, one of the plaintiffs, the live stock contracts attached to the second amended original answer of the defendant, Texas & Pacific Railway Company, for his signature, which contracts were for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., that when said Eastin was informed that his cattle were routed by way of Paris he objected and stated that the route was much further than by way of Ft. Worth and from there over the said St. Louis & San Francisco, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco to Tulsa, I. T.;

said agent Tucker then and there informed the plaintiff Eastin that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn to Tulsa, I. T., over any other route except by its own line to Paris and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the purpose of getting his cattle shipped, signed said contracts attached to said second
133 amended answer of defendant Texas & Pacific Railway Company he did this unwillingly because he thought that was the only means by which he could get his cattle shipped through from Strawn to Tulsa on through bill of lading:" 1st. Because it appears from the evidence that said contracts only provided for the transportation of said cattle over the line of the Texas & Pacific Railroad from Strawn, Texas, to Paris, Texas, and did not provide for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa, I. T.; 2nd. Because it appears from the evidence that at said time this defendant offered to bill and ship said cattle from Strawn, Texas, over the line of the Texas & Pacific Railway Company, to Ft. Worth, Texas, upon a local rate of freight, or to bill and ship said cattle through upon a through rate from Strawn, Texas, over the line of the Texas & Pacific Railway Company to either Sherman, Texas, or Paris, Texas; 3rd; Because it appears from the evidence that plaintiffs signed said contracts willingly and without objection or protest, and that plaintiffs requested and directed this defendant to bill and ship said cattle via Paris, Texas.

5. The Court erred in the second paragraph of its findings of fact wherein the court finds as a fact that "the plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris and had he not believed that was the only means by which he could get his said cattle shipped through to Tulsa"; Because 1st; It appears from the evidence that at said time this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of the Texas & Pacific Railway Company upon the local rate, or to bill and ship said cattle through to
134 Tulsa, I. T., upon the through rate via Sherman, Texas, or Paris, Texas; 2nd; that the plaintiff Eastin signed said contracts willingly without objection or protest and requested and directed this defendant to bill and ship said cattle via Paris, Texas.

6. The Court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the defendant could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth and could have there delivered them to said St. Louis & San Francisco road"; Because it appears from the evidence that at the time of the shipment of said cattle the defendant Texas & Pacific Railway Company did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle, upon a through rate and billing,

over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T. and that at said time the Texas & Pacific Railway Company was not authorized, and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T., upon through billing and a through rate.

7. The Court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs, at time of said shipment, did not know that they could have their cattle shipped over the Texas & Pacific Railway Company's road to Sherman and from there over the St. Louis & San Francisco Railroad Company's line." Because it appears from the evidence that at the time the plaintiff Eastin signed the contracts attached to the second amended answer of the Texas & Pacific Railway Company the said
135 Eastin was told and informed by this defendant that said cattle could be shipped upon a through rate via Sherman, Texas, or Paris, Tex.

8. The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that by positively refusing to route said cattle over any route than by way of Paris, when there were other ways known to him by which they could have been routed, and as he knew the plaintiffs wished them routed, this defendant became liable to the plaintiffs"; Because, 1st: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts, and in the shipment of said cattle, this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle, and at the time of the shipment of said cattle, it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant acted and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; 2nd: It appears from the evidence that this defendant offered to route said cattle over other routes than by way of Paris, Texas, and that said cattle were routed over the route via. Paris, Texas, at the request and under the direction of the plaintiffs.

9. The court erred in the second paragraph of its findings of facts wherein the court found as a fact "that said shipping contracts were signed by the plaintiff Eastin by reason of duress, and for that reason not binding on plaintiffs"; Because it appears from the evidence that the said Eastin executed and signed said contracts willingly and without objection or protest.

10. The court erred in its conclusions of law wherein the
136 court concludes: "The fact that the defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company,

positively refused to route the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damage sustained by the cattle notwithstanding the injury occurred beyond the line of the defendant Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant Texas & Pacific Railway Company was not to be responsible, for any injury occurring after the cattle left its line will not relieve it as such contract is not binding on the plaintiffs by reason of duress"; Because 1st: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts, and in the shipment of said cattle, this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle, and at the time of the shipment of said cattle, it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant acted and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; 2nd; It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction, and at the request and with the consent of plaintiffs; 3rd; It appears from the evidence that on or about the 18th day of April, 1902, plaintiffs' agent, Mr. Chase, called upon this defendant at the depot of The Texas & Pacific Railway Company at Strawn, Texas, and only stated to this defendant that he wanted him, this defendant, to get or have 18 cars ready for the shipment of said cattle from Strawn, Texas, to Tulsa,
137 I. T. on the 22nd day of April, 1902, and for him to order said cars via Ft. Worth, Texas, and the Frisco; that at said time nothing else was said about said cars and that nothing was said by either this defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be shipped and transported, or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., and that at said time this defendant did not agree to furnish said cars for the shipment and transportation of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of The Texas & Pacific Railroad, and from Ft. Worth, Texas, over the line of the St. Louis & San Francisco Railroad Company; 4th: It appears from the evidence that said contracts only provided for the transportation of said cattle over the line of the Texas & Pacific railroad from Strawn to Paris, and did not provide for the transportation of said cattle from Strawn to Tulsa, I. T., over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa, I. T.; that this defendant offered to bill and ship said cattle from Strawn, Texas, over the line of the Texas & Pacific Railway Company, to Ft. Worth, Texas, upon a local rate of freight, or to bill and ship said cattle through upon a through rate from Strawn, Texas, over the line of the Texas & Pacific Railway Company, to either Sherman,

Texa[illegible] or Paris, Texas; and that plaintiffs signed said contracts willingly and without objection or protest; 5th; that at the time of the shipment of said cattle the defendant, Texas & Pacific Railway Company did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle, upon a through rate and billing, over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., and that at said time

138 The Texas & Pacific Railway Company was not authorized and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; and that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T., upon through billing and upon a through rate; and there is no evidence before the Court showing that this defendant owed plaintiffs any duty which he failed to perform.

11. The Court erred in refusing to remove this case, and in denying this defendant, and its co-defendant, The Texas & Pacific Railway Company, the right to remove this case to the Circuit Court of the United States for the Northern District of Texas and in retaining jurisdiction to hear and determine this case, as is fully shown by this defendant's and its co-defendant's bill of exception No. 1.

12. The Court erred in the second paragraph of its findings of fact, wherein the court found as a fact "that the plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that defendant Tucker knew this fact; and find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa over the St. Louis & S. F. railroad, he would have shipped them that way if the defendant would have so done"; because, 1st; There is no evidence before the Court showing that the defendant Tucker knew that plaintiffs were desirous of shipping said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T. and there is no evidence before the court showing that plaintiffs informed this defendant that they were desirous of

139 shipping said cattle from Strawn, Texas, to Tulsa, I. T. by the shortest and most direct route; 2nd. Plaintiffs do not plead that they informed the said J. M. Tucker they wanted said cattle shipped by the shortest and most direct route; 3rd; There is no evidence before the court that plaintiffs wanted or would have shipped said cattle via Sherman, Texas, and from there to Tulsa, via St. Louis, & S. F. R. R.; 4th: It appears from the evidence that the defendant Tucker offered to ship said cattle via Sherman, Texas, and from there to Tulsa over the St. L. & S. F. Railroad, but that plaintiffs directed and requested said cattle shipped via Paris, Texas.

Wherefore this defendant says the judgment and rulings of the Court does him manifest injustice, are contrary to law and the evidence, and prays the Court to set the judgment as rendered by the

Court aside, and grant him a new trial in order that justice may be done this defendant.

H. C. SHROPSHIRE,
Attorney for Defendant, J. M. Tucker.

Endorsed: # 3985. S. W. Eastin & D. L. Knox *vs.* J. M. Tucker, *et als.* First Amended Motion for New Trial of Defendant J. M. Tucker. Filed Nov. 22, 1904. A. C. R. Morgan, Dist. Clerk.

Order Overruling Motion of Def't Tucker for New Trial.

Nov. 22, 1904.

Notice of Appeal.

20 Day Order.

Def't Tucker's Exceptions to Conclusions of Law & Fact.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

Nov. 22, 1904.

140 This day coming on to be heard the first amended motion of the defendant J. M. Tucker for a new trial of this cause; and the same having been heard and considered by the court, the court is of the opinion that the law is against said motion; it is therefore ordered and adjudged by the court that said first amended motion for a new trial be and the same is hereby refused and in all things overruled; to which action and ruling of the Court the defendant J. M. Tucker excepts and in open court gives notice of appeal to the Court of Civil Appeals for the second Supreme Judicial District of Texas, at Fort Worth. It is further considered and ordered by the Court that the defendant J. M. Tucker be and he is hereby allowed twenty days time from and after the adjournment of the present term of the District Court of Parker County, Texas, in which to present and have approved and filed his statement of facts and bills of exceptions in this case. The defendant J. M. Tucker excepts to the findings of fact and conclusions of law filed in this behalf this day by the Court.

Amended Motion of T. & P. R'y Co. for New Trial.

Filed Nov. 22, 1904.

In the District Court of Parker County, Texas, A. D. 1904.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET ALS.

Now comes The Texas & Pacific Railway Company, defendant in the above numbered and entitled cause, and with leave of the Court therefor first obtained, files this its first amended motion for a new trial in lieu of its original motion filed herein on the 12th. day of November, 1904, and prays the court to set aside the judgment rendered by this court on the trial of this case in the District Court of Parker County, Texas, on the 11th. day of November, 1904, in favor of the plaintiffs, and against this defendant, and its co-defend-
141 ant, J. M. Tucker, and grant it a new trial for the following good and sufficient reasons, to-wit:

1. The judgment is contrary to law and unsupported by the evidence in this: It appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written contracts the liability of this defendant, if any, was limited to such injuries and damages as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this defendants' own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or be deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier, without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of railroad did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad, or any line of railroad owned and operated by this defendant, after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defend-
142 ant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control

of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs; and that plaintiffs executed and signed said contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any authority to ship said cattle upon through billing and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate, whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas.

2. The judgment is contrary to law and unsupported by the
143 evidence in this: There is no legal or sufficient evidence before the Court showing the market value of the cattle in controversy at Tulsa, I. T., at the time of their arrival there, in the condition in which they were delivered at Tulsa, I. T., and there is no legal or sufficient evidence before the court showing the market value of such cattle at Tulsa, I. T. at the time of their arrival there, had the cattle been delivered at Tulsa, I. T., with due care and in proper condition; there is no legal or sufficient evidence before the Court showing the difference between the market value of the cattle at Tulsa, I. T., at the time of their arrival there, in the condition in which they did arrive there, and the market value of said cattle at Tulsa, I. T., at the time of their arrival there, had they been delivered there at said time in due time and in proper condition; wherefore this defendant says the judgment is excessive, and that it was error for the Court to find as a matter of fact, as the Court did find in the second paragraph of its findings of fact, that the 29 head of said cattle killed were of the value of $20.00 per head, and that the balance of the grown cattle were damaged five dollars per head, and that plaintiffs were damaged in the sum of $3600.00.

3. The judgment is contrary to law and unsupported by the evidence in this; The judgment is excessive in this: It appears from the evidence that said cattle would naturally and necessarily have

sustained some damage in the shipping and transportation of them from Strawn, Texas, to Tulsa, I. T., regardless of how they were handled upon the train and elsewhere during transportation; that only 29 head of said cattle were killed or died from injuries received while being carried and transported from Strawn, Texas, to Tulsa, I. T. and that the balance of the grown cattle, being some 585 head, were damaged to the extent of about five or six dollars per head; that of this number some 550 head were cows about all of which were
144 with calves, and that a great number of said cows lost their calves by reason of the treatment they received during the time they were being carried and transported upon the cars; that the greater part of the damage and injury sustained by the cows which lost their calves was caused by reason of their having lost their calves; that at the time said cows were tendered to and received by this defendant for shipment, and at the time said cattle were loaded upon this defendant's cars and shipped by this defendant, and at the time of the execution and making of the contracts upon which said cattle were shipped, this defendant did not know and was not informed that any of said cows were with calves and there was nothing in the appearance of said cows which indicated to this defendant or its agent, J. M. Tucker, that such cows were with calves. That plaintiffs do not plead or allege that this defendant was informed or knew that any of said cows were with calves or that there was anything in the appearance of said cows that indicated that any of said cows were with calves; wherefore this defendant says the judgment is excessive, and that it was error for the court to find as a matter of fact, as the court did find in the second paragraph of the court's findings of fact, that the balance of the grown cattle were damaged five dollars per head.

4. The Court erred in the second paragraph of its findings of fact wherein it found as a matter of fact, that on or about the 18th. day of April, 1902, plaintiffs "applied to the defendant J. M. Tucker, agent of the Texas & Pacific Railway Company at Strawn, Texas, for 18 stock cars to be furnished at Strawn on the 22nd. of April, 1902, for the purpose of shipping 18 cars of cattle from said station of Strawn on defendant's line of railroad, to Tulsa, a station on the St. Louis & San Francisco Railroad in the Indian Territory. That the plaintiffs, at the time of ordering said cars informed the defendant Tucker, as agent of Texas & Pacific Railway Com-
145 pany, that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. That said Tucker, as such agent, agreed to and did furnish said cars at Strawn on the 22nd. of April, 1902," because 1st: Plaintiffs do not plead and allege in their petition that they did so inform the defendant Tucker, as agent of this defendant, at the time they ordered said cars, that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad and from Ft. Worth, Texas, to Tulsa, I. T. over the line of the St. Louis & San Francisco Railroad Company; 2nd;

It appears from the evidence that the defendant Tucker, as agent of this defendant, did not agree to and did not furnish said cars on the 22nd. day of April, 1902, for the purpose of shipping said cattle over the line of this defendant's road from Strawn, Texas, to Ft. Worth, Texas, and from there on over the line of the St. Louis & San Francisco Railroad Company to Tulsa, I. T.

5. The court erred in the second paragraph of its findings of facts wherein the court found as a fact that late in the evening of the 22nd. day of April, 1902, "and after most of the cattle were loaded, the agent of defendant, The Texas & Pacific Railway Company, the said J. M. Tucker, one of the defendants herein, presented to S. W. Eastin, one of the plaintiffs, the live stock contracts attached to the second amended original answer of the defendant Texas & Pacific Railway Company for his signature which contracts were for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over the Texas & Pacific Railroad to Paris, Texas, and from there on over the St. Louis & San Francisco Road to Tulsa; that when said Eastin was informed that his cattle were routed via Paris he objected and stated that the route was much further than by way of Ft. Worth, and from there over the said St. Louis & San
146 Francisco railroad, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco railroad to Tulsa, I. T. Said agent Tucker then and there informed the plaintiff Eastin that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn, to Tulsa, I. T. over any other route except by its own line to Paris, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the purpose of getting his cattle shipped, signed said contracts attached to said second amended original answer of the defendant, Texas & Pacific Railway Company; he did this unwillingly because he thought that was the only means by which he could get his cattle shipped through from Strawn, Texas, to Tulsa, I. T., on through bill of lading. That the plaintiffs had no place to put the cattle if they were not shipped through to Tulsa I. T., near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only means by which he could get his said cattle shipped through to Tulsa;" because, 1st; It appears from the evidence that at the time said contracts were presented to the plaintiff Eastin but little more than half of said cattle were loaded on the cars; 2nd; It appears from the evidence that said contracts only stipulated and provided for the transportation of said cattle from Strawn, Texas, over the road of this defendant to Paris, Texas, and did not stipulate and provide for the transportation of said cattle from there on over the St. Louis & San Francisco road to Tulsa, I. T.; 3rd; It appears from the evidence that the plaintiff Eastin signed said contracts

willingly and without objection or protest; 4th: It appears from the evidence that at said time the said J. M. Tucker, agent of
147 this defendant, offered to route said cattle through via Sherman, Texas, under the direction and at the request and with the consent of plaintiffs.

6. The court erred in the second paragraph of its findings of fact wherein the court found as a fact that this defendant "could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road;" because 1st: It appears from the evidence that at the time of the shipment of said cattle this defendant did not have any arrangement or agreement with the said St. Louis & San Francisco road for the shipment and transportation of said cattle upon through billing and a through freight rate via said St. Louis & San Francisco railroad from Ft. Worth, Texas, to Tulsa, I. T., that at said time this defendant did not have any authority and was not authorized to route cattle upon through billing and a through rate over the line of the said St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T.; 2nd: It appears from the evidence that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried and transported the same over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T. upon through billing and upon a through freight rate.

7. The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs at the time of said shipment did not know that they could have their cattle shipped over the Texas & Pacific Railway to Sherman and from there over the St. Louis & San Francisco railroad; that the route by way of Sherman was as short as the one by Ft. Worth and would have suited them, the plaintiffs, as well as the way by Ft. Worth;" because, 1st; It appears from the evidence that at the time said
148 cattle were received and shipped by this defendant plaintiffs were told and informed by this defendant's agent J. M. Tucker, that this defendant could and would bill and ship said cattle upon a through freight rate via Sherman Texas; 2nd: There is no evidence before the court showing or tending to show that the route via Sherman would have suited plaintiffs as well as the way by Ft. Worth, Texas.

8. The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that said shipping contracts were signed by the plaintiff Eastin by reason of duress, and for that reason not binding on plaintiffs"; because it appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest.

9. The court erred in the second paragraph of its findings of fact wherein the court found as a matter of fact that the said "Tucker refused to route said cattle through from Strawn to Tulsa, I. T., over any other route except by this defendant's own line to Paris, and from there on over the St. Louis & San Francisco Road to

Tulsa, I. T."; because it appears from the evidence that the said Tucker offered to route said cattle through from Strawn to Tulsa, I. T., over the defendant's own line to Sherman, Texas.

10. The court erred in its conclusions of law wherein it concludes that "the fact that the defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant Texas & Pacific Railway Company was not to be responsible for any injury occurring after said cattle left its line, will not
149 relieve it, as said contracts are not binding on the plaintiffs by reason of duress"; Because it appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written contracts the liability of this defendant, if any, was limited to such injuries and damage as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier, without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of Railroad did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad, or any line of railroad owned and operated by this defendant, after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and dam-
150 age sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed said contracts willingly and without objection or protest; that

at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any authority to ship said cattle upon through billing and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate, whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas.

11. The court erred in failing and refusing to find as a fact that this defendant, at the time said cattle were tendered to and received by it for shipment, offered to bill and ship said cattle from Strawn, Texas, over its own line of road, to Ft. Worth, Texas, upon
151 its local freight rate, and there deliver said cattle to plaintiffs or to any one else they might designate, because it appears from the evidence that at said time this defendant's agent, J. M. Tucker, told and informed the plaintiff Eastin that this defendant could and would bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate and would there deliver said cattle to plaintiffs or to any one he might designate.

12. The court erred in refusing to remove this case, and in denying this defendant, and its co-defendant, J. M. Tucker, the right to remove this case to the Circuit Court of the United States for the Northern District of Texas, and in retaining jurisdiction to hear and determine this case for the reasons set forth in these defendant's petition and bond for the removal of this case to the said Circuit Court of the United States for the Northern District of Texas, and as is more fully shown by this defendant's, and J. M. Tucker's bill of Exception No. 1.

13. The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that defendant Tucker knew this fact; and find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa, over the St. L. & S. F. railroad, he would have shipped them that way if defendant would have so done," because 1st: Plaintiffs do not plead and allege that the defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa;

2nd: There is no evidence before the court showing that defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to
152 Tulsa; 3rd: Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman and from there over the St. L. & S. R. R. if this defendant would have so done; 4th: There is no evidence before the court showing that plaintiffs would have shipped said cattle to Sherman, and from there over the St. L. & S. F. railroad to Tulsa if this defendant would have so done; 5th: It appears from the evidence that the defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. L. & S. F. railroad to Tulsa, I. T., but that plaintiff Eastin directed and requested defendant Tucker to bill and ship said cattle to Paris, Texas.

Wherefore this defendant says the judgment and rulings of the court does it manifest injustice, are contrary to law and the evidence, and prays the Court to set the judgment aside and grant it a new trial in order that justice may be done this defendant.

H. C. SHROPSHIRE,
Att'y for Def't T. & P. Ry. Co.

Endorsed: #3985. S. W. Eastin & D. L. Knox *vs.* J. M. Tucker *et als.* First Amended Motion for New Trial of Defendant, T. & P. Ry. Co. Filed Nov. 22, 1904, A. C. R. Morgan, Dist. Clerk.

Order Overruling Amended Motion of T. & P. Ry. Co. for New Trial.

Nov. 22, 1904.

Notice of Appeal.

20 Day Order.

Def't T. & P. Excepts to Conclusions of Law and Fact.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

NOVEMBER 22, 1904.

This day coming on to be heard the first amended motion
153 of the Texas & Pacific Railway Company, defendant in the above numbered and entitled cause for a new trial of this cause; and the same having been heard and considered by the court, the court is of the opinion that the law is against said motion; it is therefore ordered and adjudged by the court that said first amended motion for a new trial be and the same is hereby refused and in all things overruled; to which action and ruling of the Court the de-

fendant, The Texas & Pacific Railway Company excepts, and in open Court gives notice of appeal to the Court of Civil Appeals for the second Supreme Judicial District of the State of Texas at Fort Worth. It is further considered and ordered by the Court that the defendant, The Texas & Pacific Railway Company be and it is hereby granted and allowed twenty days' time from and after the adjournment of the present term of the District Court of Parker County, Texas, in which to present and have approved and filed its statement of facts and bills of exceptions in this case.

The defendant, The Texas & Pacific Railway Company excepts to the findings of fact and conclusions of law filed in this behalf this day by the court.

General 20 Day Order.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

NOVEMBER 22, 1904.

It is ordered by the court that all the parties hereto be and they are hereby granted and allowed twenty days after the adjournment of this term of Court in which to make up, have signed and file a statement of facts and bills of exceptions herein.

Def't Tucker's Appeal Bond.

Filed Dec. 10, 1904.

154 In the District Court of Parker Co., Texas.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

Whereas, in the above numbered and entitled cause, pending in the District Court of Parker County, Texas, and at a regular term of said Court, to-wit: on the 11th day of November, 1904, the plaintiffs in the above cause, S. W. Eastin and D. L. Knox recovered a final judgment against J. M. Tucker and the Texas & Pacific Railway Company, the defendants in said cause, for the sum of Thirty-Six Hundred and no/100 Dollars, with interest thereon from the date of said judgment, at Six per cent. per annum, and all costs of suit, from which final judgment the said defendant J. M. Tucker has taken an appeal to the Court of Civil Appeals of the State of Texas, and desires to suspend the execution of said judgment during the pendency of its said appeal.

Now, therefore, we, J. M. Tucker, as principal, and Edw. O. Tenison and C. R. Buddy, as sureties, acknowledge ourselves bound to pay to S. W. Eastin, D. L. Knox, The Texas & Pacific Railway Company, and the St. Louis & San Francisco Railroad Company, plaintiff in the above cause, the sum of Eight Thousand and no/100 Dollars, conditioned that the said J. M. Tucker shall prosecute his appeal with effect, and in case the judgment of the Supreme Court or Court of Civil Appeals shall be against him, the said J. M. Tucker, that he shall perform the judgment, sentence or decree of the said Court, and pay all such damages as said court may award against him, the said J. M. Tucker.

Witness our hands, this the 25th day of November, 1904.

(Signed) J. M. TUCKER,
By H. C. SHROPSHIRE,
His Attorney.
EDW. O. TENISON.
C. R. BUDDY.

155 Approved Dec. 10, 1904.
A. C. R. MORGAN,
Dist. Clerk, Parker Co., Texas.

Endorsed: No. 3985. District Court, Parker County. S. W. Eastin & D. L. Knox *vs.* J. M. Tucker *et als.* Appeal Bond. Filed Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court, Parker Co. Approved Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court, Parker Co.

Appeal Bond of T. & P. R'y Co.

Filed Dec. 10, 1904.

In the District Court of Parker Co., Texas.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET ALS.

Whereas, in the above numbered and entitled cause, pending in the District Court of Parker County, Texas, and at a regular term of said court, to-wit: on the 11th. day of November, 1904, the plaintiffs in the above cause S. W. Eastin & D. L. Knox, recovered a final judgment against J. M. Tucker and The Texas & Pacific Railway Company, the defendants in said cause for the sum of Thirty-six hundred and no/100 Dollars, with interest thereon from the date of said judgment at six per cent. per annum, and all costs of suit, from which final judgment the said defendant The Texas & Pacific Railway Company has taken an appeal to the Court of Civil Appeals of the State of Texas, and desires to suspend the execution of said judgment during the pendency of its said appeal;

Now, therefore, We, The Texas & Pacific Railway Company, as principal, and Edw. O. Tennison and C. R. Buddy, as sureties, acknowledge ourselves bound to pay to S. W. Eastin, D. L. Knox, J. M. Tucker and the St. Louis & San Francisco Railroad Company plaintiff in the above cause, the sum of Eight Thousand and no/100 Dollars, conditioned that the said The Texas & Pacific Railway Company shall prosecute its appeal with effect, and in case the
156 judgment of the Supreme Court or Court of Civil Appeals shall be against it, the said The Texas & Pacific Railway Company, that it shall perform the judgment, sentence or decree of the said court, and pay all such damages as said court may award against it the said The Texas & Pacific Railway Company.

Witness our hands, this the 25th. day of November, 1904.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
By H. C. SHROPSHIRE,
Its Attorney.
EDW. O. TENISON.
C. R. BUDDY.

Approved Dec. 10, 1904.

A. C. R. MORGAN,
Dist. Clerk, Parker Co., Texas.

THE STATE OF TEXAS, *County of Dallas:*

I, H. W. Jones, Clerk of the District Court in and for Dallas County, do hereby certify that the sureties on the within bond are in my opinion good and ample security for the amount therein specified; and that I would accept and approve same if presented to me. Given under my hand and seal of office at Dallas, this 25 day of November, A. D., 1904.

[SEAL.] H. W. JONES,
Clerk District Court, Dallas County, Texas.
By ELMO TRIMBLE, *Deputy.*

Endorsed: No. 3985. District Court, Parker County. S. W. Eastin & D. L. Knox *vs.* J. M. Tucker, *et als.* Appeal Bond. Filed Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court, Parker Co. Approved Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court, Parker Co.

Appeal Bond of St. L. & S. F. R. R. Co.

Filed Dec. 10, 1904.

District Court, Parker County.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER, TEXAS & PACIFIC RY. CO., and ST. LOUIS & SAN FRANCISCO R. R. CO., Defendants.

157 Whereas, in the above numbered and entitled cause, pending in the District Court of Parker County, State of Texas, and at a regular term of said court, to-wit: on the 11th: day of November, 1904, the said Texas & Pacific Railway Company recovered judgment against the St. Louis & San Francisco R. R. Company for the sum of Eighteen hundred ($1800.00) Dollars, with interest thereon from the 11th. day of Nov. 1904, at the rate of six (6%) per cent. per annum, and all costs of suit, from which judgment the said St. Louis & San Francisco R. R. Company has taken an appeal to our Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, and desires to suspend the execution of said judgment during the pendency of said appeal;

Now, therefore, We, the St. Louis & San Francisco Railroad Company, and W. Scott, and H. C. Holloway, as sureties, acknowledge ourselves bound to pay to the said Texas & Pacific Railway Company the sum of Four Thousand ($4000.00) Dollars, conditioned that the said St. Louis & San Francisco R. R. Company shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, that it shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it, the said St. Louis & San Francisco R. R. Company.

Witness our hands this 26th. day of November, 1904.

(Signed) ST. LOUIS & SAN FRANCISCO RAILROAD CO.,
By WEST, CHAPMAN & WEST,
Its Attorneys.

W. SCOTT,
H. C. HOLLOWAY,
By THOMAS F. WEST,
Attorney in Fact under Power of Attorney Dated April 19th, 1902.

Approved this Dec. 10, 1904.

A. C. R. MORGAN.
Dist. Clerk, Parker Co., Texas.

158 Endorsed: No. 3985. District Court, Parker County. Eastin & Knox, *vs.* J. M. Tucker, *et al.* Appeal Bond. Filed Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court Parker County. Approved Dec. 10, 1904. A. C. R. Morgan, Clerk Dist. Court, Parker County.

Assignment of Errors by The T. & P. Ry. Co.

Filed Feb. 24, 1905.

In the District Court of Parker County, Texas.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET ALS.

Now comes The Texas & Pacific Railway Company, one of the defendants in the above numbered and entitled cause, and assigns the following errors committed by the Court on the trial of the above entitled cause to its prejudice, revision and correction of which will be sought in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.

First Assignment of Error.

The judgment is contrary to law and unsupported by the evidence in this: It appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written contracts the liability of this defendant, if any, was limited to such injuries and damages as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or deemed liable for any loss or damage sustained by plaintiffs in con-
159 nection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of railway did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad, or any line of railroad owned and operated

by this defendant, after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed said contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas,
to Tulsa, I. T.; that at said time this defendant was not au-
160 thorized and did not have any authority to ship said cattle upon through billing and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon throughbilling and upon a through freight rate, whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas.

Second Assignment of Error.

The judgment is contrary to law and unsupported by the evidence in this: There is no legal or sufficient evidence before the Court showing the market value of the cattle in controversy at Tulsa, I. T. at the time of their arrival there, in the condition in which they were delivered at Tulsa, I. T., and there is no legal or sufficient evidence before the Court showing the market value of such cattle at Tulsa, I. T. at the time of their arrival there, had the cattle been delivered at Tulsa, I. T. with due care and in proper condition; there is no legal or sufficient evidence before the Court showing the difference between the market value of the cattle at Tulsa, I. T. at the time of their arrival there, in the condition in which they did arrive there, and the market value of said cattle at Tulsa, I. T. at the time of their arrival there had they been delivered there at said time in due time and in proper condition; wherefore this defendant says the judgment is excessive;

161 Third Assignment of Error.

The judgment is contrary to law and unsupported by the evidence in this: The judgment is excessive in this: It appears from the evidence that said cattle would naturally and necessarily have sustained some damage in the shipping and transportation of them from Strawn, Texas, to Tulsa, I. T., regardless of how they were handled upon the train and elsewhere during transportation; that only 29 head of said cattle were killed or died from injuries received while being carried and transported from Strawn, Texas, to Tulsa, I. T., and that the balance of the grown cattle, being some 585 head, were damaged to the extent of about five or six dollars per head; that of this number some 550 head were cows about all of which were with calves, and that a great number of said cows lost their calves by reason of the treatment they received during the time they were being carried and transported upon the cars; that the greater part of the damage and injury sustained by the cows which lost their calves was caused by reason of their having lost their calves; that the time said cows were tendered to and received by this defendant for shipment, and at the time said cattle were loaded upon defendant's cars and shipped by this defendant, and at the time and execution and making of the contracts upon which said cattle were shipped, this defendant did not know and was not informed that any of said cows were with calves, and there was nothing in the appearance of said cows which indicated to this defendant or its agent, J. M. Tucker, that such cows were with calves. That plaintiffs do not plead or allege that this defendant was informed or knew that any of said cows were with calves or that there was anything in the appearance of said cows that indicated that any of said cows were with calves;

Fourth Assignment of Error.

162 The Court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the 29 head of said cattle killed were of the value of $20.00 per head, and that the balance of the grown cattle were damaged five dollars per head, and that plaintiffs were damaged in the sum of $3600.00.

Fifth Assignment of Error.

The court erred in the second paragraph of its findings of fact in finding, as a matter of fact, that the balance of the grown cattle were damaged five dollars per head.

Sixth Assignment of Error.

The court erred in the second paragraph of its findings of fact, wherein it found, as a matter of fact, that on or about the 18th day of April, 1902, plaintiffs "applied to the defendant, J. M. Tucker, agent of the Texas & Pacific Railway Company, at Strawn, Texas, for 18 stock cars, to be furnished at Strawn on the 22nd of April, 1902, for the purpose of shipping 18 cars of cattle from said station

f Strawn on defendant's line of railroad to Tulsa, a station on the t. Louis & San Francisco Railroad in the Indian Territory. That he plaintiffs at the time of ordering said cars informed the defend-nt Tucker, as agent of The Texas & Pacific Railway Company, that hey wished to ship their cattle from Strawn to Ft. Worth, Texas, ver the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. That said Tucker, as such agent, agreed to and did fur-ish said cars at Strawn on the 22nd of April, 1902, "because 1st. Plaintiffs do not plead and allege in their petition that they did so nform the defendant Tucker, as agent of this defendant, at the time hey ordered said cars that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad, and rom Ft. Worth, Texas to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad company; 2nd. It appears from
163 the evidence that the defendant Tucker, as agent of this defendant, did not agree to, and did not furnish said cars on he 22nd day of April, 1902, for the purpose of shipping said cattle ver the line of this defendant's road from Strawn, Texas, to Ft. Worth, Texas, and from there on over the line of the St. Louis & San Francisco Railroad Company to Tulsa, I. T.

Seventh Assignment of Error.

The court erred in the second paragraph of its findings of facts herein the court found as a fact that late in the evening of the 22nd day of April, 1902, "and after most of the cattle were loaded, he agent of the defendant, The Texas & Pacific Railway Company, he said J. M. Tucker, one of the defendants herein, presented to S. W. Eastin, one of the plaintiffs the live stock contracts attached o the second amended original answer of the defendant Texas & Pacific Railway Company for his signature, which contracts were for he transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over the Texas & Pacific Railroad to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa; that when said Eastin was informed that his cattle were routed by Paris, he objected, and stated that the route was much further than by way of Ft. Worth, and from there over the St. Louis & San Francisco Railroad, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco Railroad to Tulsa, I. T. Said agent Tucker then and there informed the plaintiff Eastin that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn to Tulsa, I. T., over any other route except by its own line to Paris, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally for the purpose of getting his cattle shipped, signed said contracts attached to said second amended original answer of the defendant, Texas & Pacific
164 Railway Company; he did this unwillingly, because he thought that was the only means by which he could get his

cattle shipped through from Strawn, Texas, to Tulsa, I. T., on through bill of lading. That the plaintiffs had no place to put the cattle if they were not shipped through to Tulsa, I. T., near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only means by which he could get his cattle shipped through to Tulsa;" because, 1st. It appears from the evidence that at the time said contracts were presented to the plaintiff Eastin but little more than half of said cattle were loaded on the cars; 2nd. It appears from the evidence that said contracts only stipulated and provided for the transportation of said cattle from Strawn, Texas, over the road of this defendant to Paris, Texas, and did not stipulate and provide for the transportation of said cattle from there on over the St. Louis & San Francisco road to Tulsa, I. T. 3rd; It appears from the evidence that the Plaintiff Eastin signed said contracts willingly and without objection or protest; 4th. It appears from the evidence that at said time the said J. M. Tucker, agent of this defendant, offered to route said cattle through via. Sherman, Texas, or via Paris, Texas, and that said cattle were routed via Paris, Texas, under the direction and at the request and with the consent of plaintiffs.

Eighth Assignment of Error.

The Court erred in the second paragraph of its findings of fact wherein the Court found as a fact that this defendant "could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road;" because, 1st; It appears from the evidence that at the time of the shipment of said cattle this defendant did
165 not have any arrangement or agreement with the said St. Louis & San Francisco road for the shipment and transportation of said cattle upon through billing and a through freight rate via said St. Louis & San Francisco railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant did not have any authority and was not authorized to route said cattle upon through billing and a through rate over the line of road of the said St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., 2nd: It appears from the evidence that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried and transported the same over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate.

Ninth Assignment of Error.

The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs at the time of said shipment did not know that they could have their cattle shipped over the Texas & Pacific Railway to Sherman, and from there over the St. Louis & San Francisco Railroad; that the route by

way of Sherman was as short as the one by Ft. Worth, and would have suited them, the plaintiffs, as well as the way by Ft. Worth;" because, 1st. It appears from the evidence that at the time said cattle were received and shipped by this defendant, plaintiffs were told and informed by this defendant's agent, J. M. Tucker, that this defendant could and would bill and ship said cattle upon a through freight rate via Sherman, Texas, 2nd; There is no evidence before the court showing or tending to show that the route via Sherman would have suited plaintiffs as well as the way by Ft. Worth, Texas.

Tenth Assignment of Error.

The court erred in the second paragraph of its findings of
166 fact, wherein the court found as a fact "that said shipping contracts were signed by the plaintiffs Eastin by reason of duress, and for that reason, not binding on plaintiffs;" because, It appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection of protest.

Eleventh Assignment of Error.

The court erred in the second paragraph of its findings of fact, wherein the court found as a matter of fact that the said "Tucker refused to route said cattle through from Strawn, to Tulsa, I. T. over any other route except by this defendant's own line to Paris, and — there on over the St. Louis & San Francisco road; to Tulsa, I. T.;" because it appears from the evidence that the said Tucker offered to route said cattle through from Strawn to Tulsa, I. T. over this defendant's own line to Sherman, Texas.

Twelfth Assignment of Error.

The Court erred in its conclusions of law wherein it concludes that "the fact that the defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant Texas & Pacific Railway Company was not to be responsible for any injury occur-ing after said cattle left its line, will not relieve it, as said contracts are not binding on the plaintiffs by reason of duress;" because it appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written contracts the
liability of this defendant, if any, was limited to such inju-
167 ries and damage as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas,

to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or be deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of railroad did not extend beyond Paris, Texas and that said cattle were not transported and carried over this defendant's line of railroad or any line of railroad owned and operated by this defendant after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier, and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occur-ed while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and
168 at the request and with the consent of plaintiffs, and that plaintiffs executed and signed said contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any authority to ship said cattle upon through billing, and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T. over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T. upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate; whereupon plaintiff requested and directed that said cattle be shipped via Paris, Texas.

Thirteenth Assignment of Error.

The Court erred in failing and refusing to find as a fact that this defendant at the time said cattle were tendered to and received by it for shipment offered to bill and ship said cattle from Strawn, Texas, over its own line of road to Ft. Worth, Texas, upon its local freight rate, and there deliver said cattle to plaintiffs or to any one else they might designate, because it appears from the evidence that at said time this defendant's agent J. M. Tucker, told and onformed the plaintiff Eastin that this defendant could and would bill
169 and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, and would there deliver said cattle to plaintiffs or to any one he might designate.

Fourteenth Assignment of Error.

The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I .T., and that defendant Tucker knew this fact; and find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa, over the St. Louis & San Francisco railroad, he would have shipped them that way, if defendant would have so done, because, 1st. Plaintiffs do not plead and allege that the defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 2nd. There is no evidence before the court showing that defendant Tucker was informed or knew that plaintiff- desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 3rd. Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman, and from there over the St. Louis & San Francisco railroad if this defendant would have so done; 4th. There is no evidence before the court showing that plaintiff would have shipped said cattle to Sherman, and from there over the St. Louis & San Francisco railroad to Tulsa if this defendant would have done so; 5th. It appears from the evidence that the defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. Louis & San Francisco railroad to Tulsa, I. T., but that plaintiff Eastin directed and requested defendant Tucker to bill and ship said cattle to Paris, Texas.

Fifteenth Assignment of Error.

170 The court erred in refusing to remove this case to the Circuit Court of the United States for the Norther District of Texas for the reasons set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, filed in this court by this defendant and its co-defendant, J. M. Tucker, and for the reasons as is more fully shown by this defendant's bill of exception No. 1.

Sixteenth Assignment of Error.

The court erred in denying this defendant and its co-defendant J. M. Tucker the right to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond filed in this court by this defendant and its co-defendant, J. M. Tucker for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, and for the reasons as is more fully shown by this defendant's Bill of Exception No. 1.

H. C. SHROPSHIRE,
Attorney for Defendant The Texas & Pacific Railway Company.

Endorsed: Eastin & Knox *vs.* J. M. Tucker, *et al.* No. 3985. Assignment of Errors by the Tex. & Pac. Ry. Co. Filed Feb. 24, 1905. A. C. R. Morgan, Dist. Clerk.

Assignment of Errors by Def't J. M. Tucker.

Filed Feb. 24, 1905.

In the District Court of Parker County, Texas.

3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET ALS.

Now comes J. M. Tucker, one of the defendants in the above numbered and entitled cause, and assigns the following errors committed by the court on the trial of the above numbered and entitled
171 cause to his prejudice, revision and correction of which will be sought in the court of civil appeals for the second Supreme Judicial District of Texas, at Fort Worth.

First Assignment of Error.

The judgment is contrary to law and unsupported by the evidence in this: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing and that in the making of said written contracts and in the shipment of said cattle, this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle and at the time of the shipment of said cattle it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant

acted and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; and there is no evidence before the court showing that this defendant owed plaintiffs any duty which he failed to perform.

Second Assignment of Error.

The court erred in its conclusions of law, wherein the court concludes; "The fact that the defendant Tucker, agent for the defendant The Texas & Pacific Railway Company positively refused to route the cattle as the plaintiffs requested and desired when he could have done so, rendered both the defendants liable for all damage sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant Texas & Pacific Railway Company was not to be responsible for any injury occur-ing after the cattle left its line will not relieve it as such contract is not binding
172 on the plaintiffs by reason of duress;" because, 1st. It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts, and in the shipment of said cattle this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle, and at the time of the shipment of said cattle it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant acted, and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; 2nd. It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction and at the request and with the consent of plaintiffs; 3rd. It appears from the evidence that on or about the 18th. day of April, 1902, plaintiffs' agent Mr. Chase, called upon this defendant at the depot of the Texas & Pacific Railway Company at Strawn, Texas, and only stated to this defendant that he wanted him, this defendant, to get or have eighteen cars ready for the shipment of said cattle from Strawn, Texas, to Tulsa, I. T. on the 22nd. day of April, 1902, and for him to order said cars via Ft. Worth, Texas and the Frisco; that at said time nothing else was said about said cars, and that nothing was said by either this defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be shipped and transported, or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T. and that at said time this defendant did not agree to furnish said cars for the shipment and transportation of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of the Texas & Pacific Railroad and
173 from Ft. Worth, Texas, over the line of the St. Louis & San Francisco Railroad Company; 4th; It appears from the evi-

dence that said contracts only provided for the transportation of said cattle over the line of the Texas & Pacific Railroad from Strawn to Paris, and did not provide for the transportation of said cattle from Strawn, to Tulsa, I. T. over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco to Tulsa, I. T. that this defendant offered to bill and ship said cattle from Strawn, Texas, over the line of the Texas, & Pacific Railway Company to Ft. Worth, Texas, upon a local rate of freight or to bill and ship said cattle through upon a through rate from Strawn, Texas, over the line of The Texas & Pacific Railway Company to either Sherman, Texas, or Paris, Texas; and that plaintiff signed said contracts willingly and without objection or protest; 5th. That at the time of the shipment of said cattle the defendant, The Texas & Pacific Railway Company did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle upon through rate and billing over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., and that at said time the Texas & Pacific Railway Company was not authorized and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; and that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T. upon through billing and upon a through rate; and there is no evidence before the court showing that this defendant owed plaintiffs any duty which he failed to perform.

Third Assignment of Error.

The court erred in refusing to remove this case to the
174 Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond for the removal of this cause to said Circuit Court of the United States for the Northern District of Texas filed in this court by this defendant and his co-defendant, The Texas & Pacific Railway Company, and for the reasons as is more fully shown by this defendant's bill of exception No. 1.

Fourth Assignment of Error.

The court erred in denying this defendant and his co-defendant, The Texas & Pacific Railway Company, the right to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond filed in this court by this defendant and his co-defendant, The Texas & Pacific Railway Company, for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, and for the reasons as is more fully shown by this defendant's bill of exception No. 1.

H. C. SHROPSHIRE,
Attorney for Appellant J. M. Tucker.

Endorsed: No. 3985. S. W. Eastin & D. L. Knox *vs.* J. M. Tucker *et al.* Assignment of Errors by J. M. Tucker. Filed Feb. 24, 1905. A. C. R. Morgan, Dist. Clerk. H. C. Shropshire, Att'y for J. M. Tucker.

Assignment of Errors by St. L. & S. F. R. R. Co.

Filed Feb. 22, 1905.

In the District Court of Parker County, Texas.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Now comes the St. Louis & San Francisco Railroad Company, impleaded herein as a defendant by The Texas & Pacific Railway Company, and assigns the following errors committed by
175 the court on the trial of the above entitled cause to its prejudice, revision and correction of which will be sought in the court of Civil Appeals for the Second Supreme Judicial District of Texas.

First Assignment of Error.

The judgment of the court awarding judgment against the St. Louis & San Francisco Railroad Company, in favor of The Texas & Pacific Railway Company is not only contrary to the law and the evidence, but is wholly unjustified and unsupported by the evidence adduced, and the law arising therefrom in this: The evidence indisputably and uncontrovertibly shows that in April 1902, when Eastin & Knox tendered the cattle for shipment to the defendant Texas & Pacific Railway Company from Strawn to Tulsa, I. T. that there was a contract in existence between the Texas & Pacific Railway Company and the St. Louis & San Francisco Railroad Company whereby cattle originating at Strawn, Texas, destined for shipment to Tulsa, I. T, or the territory in and about said place should be routed via Sherman, Texas, and should be delivered to the St. Louis & San Francisco Railroad Company at Sherman, Texas; the evidence further shows without dispute that Eastin & Knox desired to have said cattle shipped over the line of the St. Louis & S. F. R. R. Co. from Sherman, Texas, to Tulsa, I. T. and the agent of The Texas & Pacific Railway Company refused to so route or ship said cattle under a through rate; but insisted that the cattle must be shipped via Paris, Texas, and there delivered to the St. Louis & San Francisco Railroad Company for carriage to Tulsa, I. T., and the cattle were so shipped and routed over the protest of the shippers. The evidence furthermore indisputable shows that the Texas & Pacific Railroad Company by thus routing said cattle, breached

its contract with the St. Louis & San Francisco Railroad Company theretofore duly entered into concerning cattle shipments and detailed above; that by reason of the law requiring the St.
176 Louis & San Francisco to receive cattle at the state line, when tendered by a connecting carrier, it had no choice in the matter, but was compelled to receive said cattle from the Texas & Pacific Railway Company at the State line near Paris, Texas. The evidence likewise indisputably shows, and it is so concluded by the trial Judge that the Texas & Pacific Railway Company could have carried the cattle to Sherman, Texas, and there delivered them to the St. Louis & San Francisco Railroad where the through rate agreement applied; that the distance from Strawn, Texas, to Tulsa, I. T. would have been the same via Sherman, Texas, as via Ft. Worth, Texas; and that the distance from Strawn, Texas via Sherman, Texas, to Tulsa, I. T. would have been about one-half the distance between said initial and terminal point via Paris, Texas, and thereby the cattle necessarily remained in transit a greater length of time than would have been the case had the Texas & Pacific Railway Company routed same via Sherman, Texas, as under its agreement with the Frisco road it was obligated to do; that by reason of such acts on the part of the Texas & Pacific Railway Company, the cattle were on the road for sixty hours, whereas, had they been shipped via Sherman, Texas, they would have only been on the road for from 20 to 30 hours, and that because of such wrongful, routing, plaintiffs Eastin & Knox suffered damage, which would not have occurred had the cattle been shipped and routed via Sherman, Texas.

Wherefore, from the undisputed evidence, it is manifest that no legal liability existed in favor of The Texas & Pacific Railway Company against the St. Louis & San Francisco Railroad Company, consequently the judgment of the court in favor of The Texas & Pacific Railway Company against this defendant is erroneous for the reasons given above.

WEST, CHAPMAN & WEST,
THEODORE MACK,
Att'ys for St. L. and S. F. R. R. Company.

177 Endorsed: Dist. Ct. of Parker Co., Tex. 3985. Eastin & Knox *vs.* J. M. Tucker *et al.* Assignment of Error by St. L. & S. F. R'rd. Co. Filed Feb. 22, 1905. A. C. R. Morgan, Dist. Clerk.

Cost Bill.

No. 3985.

EASTIN & KNOX
vs.
J. M. TUCKER ET AL.

Bill of Costs.

Clerk's Costs:

Filing & Docketing	$0.35	
3 Citations and copies	3.75	
Copies Petition and Answer	20.10	
Taxing Costs	.25	
Filing 25 Papers	3.75	
Five Appearances	.75	
Affidavit	.25	
Continuance	.20	
Docketing 2 Motions	.30	
Approving 3 Appeal Bonds	4.50	
10 Orders of Court	7.50	
Transcript to U. S. Court	22.50	
Swearing 12 Witnesses	1.20	
Judgment & Excess in Judg't	1.25	
Trans. to Ct. Civil Appeals	98.00	
		$164.65
Stenographer's fee	3.00	
Sheriff's fees, serving 3 Citations & Mileage	4.95	
		7.95
Grand Total of Costs		$172.60

178 *Clerk's Certificate.*

THE STATE OF TEXAS, *County of Parker:*

I, A. C. R. Morgan, Clerk of the District Court in and for Parker County, Texas, do hereby certify that the foregoing 179 pages of transcript, including this page, contain a true and correct copy of all the proceedings had in the case of Eastin & Knox *vs.* J. M. Tucker *et al.*, No. 3985, in the District Court of Parker County, Texas, together with a correct bill of costs in said case.

Witness my hand and seal at Weatherford, Texas, this the 28th day of February, A. D. 1905.

A. C. R. MORGAN,
Clerk District Court of Parker County, Texas.

Endorsed: No. 4908. Texas & Pacific Ry. Co. *et al.* Appellants, *vs.* Eastin & Knox, Appellees. From the District Court of Parker County. Applied for by H. C. Shropshire, Attorney for T. & P. Ry. Co. on the 1st day of February, 1905, and delivered to H. C. Shropshire on the 28th day of February, 1905. A. C. R. Morgan, Clerk

District Court, Parker County. Filed in Court of Civil Appeals for the Second Supreme Judicial District at Ft. Worth, Texas, the 2nd day of March, 1905. W. C. Strong, Clerk Court Civil Appeals for the Second Supreme Judicial District. No. 1537. Second District. Filed in Supreme Court of Texas March 3rd, 1906. F. T. Connerly, Clerk, By J. S. Myrick, Deputy. Reversed and remanded in Court of Civil Appeals May 2, 1906. No. 1688. Second District. Filed in Supreme Court of Texas March 25, 1907. F. T. Connerly, Clerk by J. S. Myrick, Deputy. Affirmed May 15, 1907. Motion for Rehearing overruled June 19, 1907. H. C. Shropshire Attorney
179 for Appellants, T. & P. Ry. Co. and J. M. Tucker, of Weatherford, Texas. West, Chapman & West, Attorneys for Appellant St. L. & S. F. Ry. Co., Post Office Address, Ft. Worth, Texas. Thomas D. Sporer, Attorney for Appellees, Eastin & Knox, Post Office Address, Jacksboro, Texas.

SUPPLEMENTAL TRANSCRIPT, FILED BY AGREEMENT.

Citation (and Return) to St. Louis & S. F. Ry. Co.

The State of Texas to the sheriff or any constable of Lamar county, said State, Greeting:

Whereas, on the 4th day of February, A. D. 1904, S. W. Eastin and D. L. Knox, plaintiffs filed in the District Court of Parker County, Texas, their petition against J. M. Tucker and the Texas and Pacific Railway Company as defendants praying for damages to Plaintiffs' cattle in transporting them from Strawn, Texas, to Tulsa, I. T. at the time and in the manner as set out in said petition, a certified copy of which accompanies this citation and is made a part hereof. And whereas, on the 7th day of April, A. D. 1904, the said defendant, The Texas and Pacific Railway Company filed its amended original answer in said case, which said case is numbered on the docket of said Court No. 3985 and in which said amended answer the said The Texas and Pacific Railway Company asks that the St. Louis & San Francisco Railway Company be made a party defendant in said suit, for the reason that the most of the damage complained of by said plaintiffs occurred on the line of the said St. Louis and San Francisco Railway Company, and that it be required to answer in this case, and that on trial that if Plaintiff should
180 recover against this defendant, The Texas & Pacific Railway Company, that it have judgment over against said St. Louis & San Francisco Railway Company for all such damages as were caused by it; Therefore you are hereby commanded to summons the said St. Louis & San Francisco Railway Company whose local agent at Paris, Lamar County is C. Griffith to be and appear before the Honorable District Court of Parker County, Texas, at the next regular term thereof, to be holden at the Court House in the town of Weatherford on the Fourth Monday after the First Monday in September, A. D. 1904, then and there to answer the said amended answer of said The Texas and Pacific Railway Company filed as

aforesaid on the 7th day of April, A. D. 1904. And you will deliver to said defendant the St. Louis & San Francisco Railway Company (by serving its local agent to-wit: C. Griffith) in person a true copy of this Citation together with the accompanying certified copies of the Plaintiffs' original petition and the said defendant, The Texas & Pacific Railway Company's amended original answer.

Herein fail not and have you before said Court on the Fourth Monday after the First Monday in September A. D. 1904, same being the third day of October, A. D. 1904, this writ with your endorsement thereon showing how you have executed the same.

Given under my hand and the seal of said Court at office in Weatherford this the 7th day of April, A. D. 1904.

Attest:

[SEAL.]

A. C. R. MORGAN,
Clerk District Court, Parker County, Texas.

Sheriff's Return.

Came to hand on the 13th day of April, A. D. 1904 at 10 o'clock A. M. and executed the 13th day of April, 1904, by delivering to C. Griffith the local agent of the within named defendant the
181 St. Louis and San Francisco Railway Company at 3 o'clock P. M. in person a true copy of this writ. together with the accompanying Certified Copies of Plaintiffs' Original petition and amended original answer of the Texas & Pacific Railway Company.

E. C. HINDMAN,
Constable, Precinct No. One, Lamar Co., Texas.

Fees.

Serving 1 copy	$0.75
Mileage	.10
	.85

THE STATE OF TEXAS, *County of Parker:*

I, A. C. R. Morgan, Clerk of the District Court of Parker County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Citation issued for and served on the St. Louis and San Francisco Railway Co. together with the endorsements thereon in the above numbered and styled cause now pending in said Court.

Witness my hand and the seal of said Court this 7th day of June, A. D. 1904.

[SEAL.]

A. C. R. MORGAN,
Clerk of Dist. Court, Parker Co., Texas,
By M. V. KENNISON, *Deputy.*

In Court Civil Appeals, 2nd Supreme Judicial District of Texas.

No. 4908.

T. & P. Ry. Co. et al.
vs.
Eastin & Knox.

It is hereby agreed by and between all the parties herein that this certified copy of citation & return served on the St. L. & S. F. Ry. Co. shall be filed and considered as a part of the supplemental Transcript and with it as a part of the transcript as it was
182 inadvertently omitted.

THOS. D. SPORER,
Att'y for Eastin & Knox, Appellees.
H. C. SHROPSHIRE,
Att'y for Appellant-, T. & P. Ry. Co. & J. M. Tucker.
WEST, C. & W.,
THEODORE MACK,
Atty's for Frisco.

Endorsed: Original. No. 3985. District Court, Parker County. S. W. Eastin & D. L. Knox, *vs.* J. M. Tucker, *et al.* Citation. Issued April 7, 1904. A. C. R. Morgan, District Clerk. Filed the 9th day of August, 1904. A. C. R. Morgan, Clerk.

Original Citation Served on T. & P. Ry. Co., Defendant.

The State of Texas, *County of Parker:*

At a term of the District Court begun and holden within and for the county of Parker at Weatherford on the 3rd day of October, A. D. 1904, and which adjourned on the 22nd day of November, A. D. 1904, the Honorable J. W. Patterson, judge thereof presiding, the following cause came on for trial, to-wit:

No. 3985.

Eastin & Knox
vs.
J. M. Tucker et al.

The State of Texas to the sheriff or any constable of Parker county, said State, Greeting:

You are hereby commanded to summon The Texas & Pacific Railway Company by serving its local agent at Weatherford in Parker County, Texas, to be and appear before the Honorable District
183 Court of Parker County, Texas, at the next regular term thereof, to be holden at the court house in the town of Weatherford, on the Fourth Monday after the first Monday in

March, A. D. 1904, then and there to answer to the Plaintiff's petition filed in a suit in said court on the 4th day of February, A. D. 1904, wherein S. W. Eastin and D. L. Knox are plaintiffs and J. M. Tucker and The Texas & Pacific Railway Company are defendants. File Number of said suit being 3985.

The nature of the plaintiff's demand is as follows, to-wit: This is a suit for damages. Plaintiffs allege that they are partners doing a cattle business under the firm name of Eastin & Knox and complain of The Texas & Pacific Railway Company, defendant, and also of J. M. Tucker, defendant, who was the agent of said Railway Company at Strawn, a station on the railroad of said defendant company, on to-wit: the 23rd day of April, 1902, the date of the transaction complained of by plaintiffs herein. That at said time said railway company owned and operated a certain railroad extending through the counties of Palo Pinto, Parker, Tarrant, Denton, Grayson, Fannin and Lamar in the State of Texas, and was then and still is engaged in the business of running railroad cars and operating same and of transporting cattle and other live stock and freight over said road as a common carrier for hire. That said Def't Tucker was at said time the agent of said company at said station of Strawn in Palo Pinto County, and as such agent represented said railway company in the transportation and shipping of freight and especially live stock and in making contracts therefor from said Strawn station.

That a few days prior to said April 23rd, 1902, plaintiffs notified said agent Tucker that they desired to ship the hereinafter named cattle to Tulsa, I. T., and for him to have sufficient number of cars ready on said date so that said cattle would not be delayed at
184 Strawn. That plaintiffs prior to that time had made arrangements with the St. Louis & San Francisco Railway Company to have said cattle shipped from Strawn, Texas, to Ft. Worth and thence over the line of the Red River, Texas & Southern Railway Company and of the said St. Louis & San Francisco Railway Company to said Tulsa, I. T., which would be the shortest and most direct route from the said Strawn to said Tulsa. That on said date and at said town of Strawn plaintiffs tendered and delivered to defendant J. M. Tucker for said defendant company 615 head of stock cattle and 97 head of calves of the total value of $12,880.00 to be shipped in the most expeditious manner and over the shortest and most direct route from Strawn to Tulsa, I. T. That said J. M. Tucker then and there agreed to and did accept said cattle for the purpose of transporting them as a common carrier for hire from Strawn to Tulsa at Plaintiffs' request with reasonable diligence and speed, safely and securely as plaintiffs supposed by the shortest and most direct route.

That on said day after all said cattle had been about loaded on the cars the agent of the plaintiffs and S. W. Eastin were notified and requested by said Tucker to sign the bill of lading, or live stock contract, which billed said cattle over the line of defendant company to Paris, Texas, and from thence over the line of R. R. of the St. Louis & San Francisco Railway Company to Monette, Mo.,

and from thence in a southwesterly direction down to Tulsa, I. T. That said agent of plaintiff and said Eastin objected and insisted that said cattle should be taken either to Ft. Worth or to Sherman and there delivered to the Red River, Texas & Southern Railway Company which connects with the St. Louis & San Francisco Ry. Co. at or near the North boundary line of the State of Texas, but said agent of said defendant company refused to comply with plaintiffs' request and told the agent of plaintiffs that the said
185 cattle would not be shipped to Tulsa in any other way than the way they had them billed and that they had to be shipped in that way or not at all.

That said cattle were stock cattle and not in a very good condition and could not stand to be driven around or hauled about unnecessarily of which fact said Tucker was notified. That plaintiffs had leased a pasture in the Indian Territory near said Tulsa for said cattle and said Tucker knew said plaintiffs were compelled to ship said cattle on that date. That plaintiffs could not take them to any other railroad for shipment. That plaintiffs would not have driven said cattle to Strawn for shipment on that day if they had known they would be transported via Paris, Texas, and Monette, Mo. That plaintiffs' said agent signed said contract but did so under compulsion and duress after defendants had received all of said cattle in their stock pens for shipment. That said route was a very indirect one and was some 289 9/10 miles longer and farther than from said Ft. Worth via said Sherman to said Tulsa over the line of the Red River, Texas & Southern Railway Company, and the St. Louis & San Francisco Railway Company and 296 miles longer and farther than from said Ft. Worth over the T. & P. Railroad to Sherman and over the St. Louis & San Francisco Railway to said Tulsa. That the most direct and most expeditious route would have been from Ft. Worth over the Red River, Texas & Southern Railway and the St. Louis & San Francisco Railway to said Tulsa which was only about 301 miles from Ft. Worth. That the defendants were actuated in their conduct here complained of by the desire to get a larger percentage of the freight paid regardless of plaintiffs' interests.

That if the cattle had been routed as the plaintiffs requested they would have been transported in about 15 hours. That as the cattle were shipped they had to be unloaded at Paris, Texas, and reloaded on cars of the St. Louis & San Francisco Railway Company.
186 That the stock pens where said cattle were so unloaded were muddy and in such a bad condition that many cows bogged down in the mud and were thereby much worried, weakened, enfeebled and damaged and would not eat and drink it being impossible for most of them to reach the water and feed troughs. That from the effects of bogging down in the mud one cow of the value of $20.00 died. That plaintiffs were compelled to pay $54.00 for feeding said cattle at Paris which feeding would have been unnecessary had the said cattle been shipped as plaintiffs desired. That when said cattle reached Catoos, the station just before Tulsa, they were detained for a period of 15 hours during which delay

they had to do without food or water and were side-tracked and not allowed to stand still but constantly switched backward and forward in such a manner that they were jolted and jostled together till most of them were knocked down and trampled upon by the others and were thereby bruised, skinned and weakened and most of their strength lost so that when they reached Tulsa they were in poor, feeble and bruised condition and scarcely able to leave the cars and stand upon their feet after they were removed therefrom. That it took 60 hours to transport said cattle by said route including the delay at Catoos which delay was needless and unnecessary. That it was an act of gross negligence to transport said cattle by such a route and in such a manner. That many of said cattle died by reason of such ill treatment amounting to 40 head of the value of $20.00 each. That said cattle could not be at once removed from said Tulsa to said pasture on account of their weakened condition and plaintiffs had to pay $30.00 for pasturage for them; $11.40 for boarding hands; $6.50 for horse feed; $2.50 livery bill, and $29.50 for the hire of hands attending to said cattle at Tulsa. That in said lot of cattle were about 550 cows all with calf and by reason of said rough treatment 362 head thereof dropped their calves out of season and by reason thereof plaintiffs were damaged in
187 the sum of $2,172.00. That said cattle never did fully recover or recuperate as they should have done in order to be placed on the market or even sold, and were damaged in their market value at Tulsa not less than $6.00 per head. That by reason of said cattle being shipped over said route plaintiffs had to pay and did pay $1035.00 for their transportation whereas they would have had to pay only $952.20 had they been transported from Strawn, via Ft. Worth and over the lines of the Red River, Texas & Southern Railway Company and the St. Louis & San Francisco Railway Company and are therefore entitled to recover against defendants $82.80 the difference in the freight charges via the two said routes to said Tulsa.

Plaintiffs allege that they have been damaged in the sum of $8000.00 and pray that defendants be cited to appear and answer herein, and that on final trial hereof they have judgment against said defendants for the amount of their damages, interest and all costs of suit, and for general and special relief.

And you will deliver to said defendant, The Texas & Pacific Railway Company, (by delivering to its local agent at Weatherford, in Parker County, Texas, in person,) a true copy of this citation.

Herein fail not, and have you before said court, on the 4th Monday after the 1st Monday in March, A. D. 1904, same being the 4th day of April, A. D. 1904, this writ with your indorsement thereon showing how you have executed the same.

Given under my hand and the seal of said court at office in Weatherford, this the 4th day of February, A. D., 1904.

Attest:

[SEAL.] A. C. R. MORGAN,

Clerk District Court, Parker County, Texas.

Sheriff's Return.

Came to hand on the 5th day of February, A. D. 1904, at 12 o'clock, m., and executed the 5th day of February, A. D.
188 1904, at 3 o'clock, p. m., by delivering to W. W. Myers in person, the local agent of The Texas & Pacific Railway Company, the within named defendant at Weatherford in Parker County, Texas, a true copy of this writ.

D. C. BRATTON,
Sheriff of Parker County, Texas.
By B. R. BARKER, *Deputy.*

Fees.

Serving one copy	$.75
Mileage	.10
	$.85

Endorsed: "Original. No. 3985. District Court, Parker County, Texas, April Term, 1904. S. W. Eastin and D. L. Knox *vs.* J. M. Tucker and The Tex. & Pac. Ry. Co. Citation. Issued February 4, 1904. A. C. R. Morgan, District Clerk. Filed the 10th day of Feb., 1904. A. C. R. Morgan, Clerk.

Order of Court Continuing Case on Application of Defendant T. & P. Ry. Co.

No. 3985.

S. W. EASTIN & D. L. KNOX
vs.
J. M. TUCKER ET AL.

APRIL 21, 1904.

It is ordered by the court that this case be continued on application of defendant, T. & P. Ry. Co.

THE STATE OF TEXAS, *County of Parker:*

I, A. C. R. Morgan, clerk of the District Court in and for Parker County, Texas, do hereby certify that the foregoing seven pages of supplemental transcript, including this page, contain a true and correct copy of the original citation issued in the case of Eastin & Knox *vs.* J. M. Tucker, *et at.* No. 3985, in the District Court of Parker County, Texas, together with a true and correct copy
189 of the order of the District Court of Parker County, Texas, continuing the above numbered and entitled cause on the application of the defendant, T. & P. Ry. Co. on the 21st day of April, 1904.

Given under my hand and seal of office this the 6th day of June, 1905.

[SEAL.]

A. C. R. MORGAN,
Clerk District Court, Parker County, Tex.,
By M. V. KINNISON, *Deputy.*

We, the undersigned attorneys of record for appellants and appellees, hereby agree that the above order of the trial court continuing this cause on the application of the defendant, T. & P. Ry. Co. and the above citation issued out of the District Court of Parker County, Texas, and served upon the defendant, T. & P. Ry. Co. in this behalf, were accidentally and inadvertently omitted and left out of the transcript by the clerk of the trial court in the preparation and making up of the original transcript filed in this court by the appellants in this cause, and that the above and foregoing seven pages contain a true and correct copy of said citation and said order of court, and that the same may be filed with the clerk of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Ft. Worth, as a part of the original transcript filed in said court by the appellants in this cause, and that said court of Civil Appeals be and it is hereby requested to receive and consider the above and foregoing order of said trial court and the above and foregoing citation as a part of the original transcript filed in this behalf the same as though the same and each of the same were inserted in their proper places in the original transcript filed herein by said appellants.

Witness our hands this the 6th day of June, 1905.

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H. C. SHROPSHIRE,
Attorney for Appellants J. M. Tucker and T. & P. Ry. Co.
C. H. YOAKUM,
WEST, CHAPMAN & WEST, &
THEODORE MACK,
Attorneys for Appellant St. Louis & San Francisco R. R. Co.
THOS. D. SPORER,
Attorney for Appellees, Eastin & Knox.

Endorsed: No. 4908. No. 1537. In Court of Civil Appeals for Second Supreme Judicial District of Texas. Texas & Pacific Ry. Co. *et al.*, Appellant, *vs.* Eastin & Knox, Appellees. Supplemental Transcript, Filed by Agreement. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, June 8, 1905. W. C. Strong, Clerk. Filed in Supreme Court March 3, 1906. F. T. Connerly, Clerk.

PROCEEDINGS IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH.

Opinion.

Filed July 1, 1905.

No. 4908.

TEXAS & PACIFIC RAILWAY COMPANY, Appellant,
vs.
EASTIN & KNOX, Appellees.

From District Court of Parker County.

Opinion.

This suit was instituted by the appellees in the district Court of Parker County on the 4th day of February, 1904, against The Texas & Pacific Railway Company and J. M. Tucker, its station agent at Strawn, Texas, for $8000 damages to cattle, shipped from Strawn, over the line of said company to Paris, Texas, and thence over the line of the St. Louis & San Francisco Railroad Company to
191 Tulsa, Indian Territory. On April 1, 1904, and prior to the time an answer to the merits was required, the appellant, the Texas & Pacific Railway Company, joined by its said agent Tucker, filed in said district court its petition and bond for removal of the case to the circuit court of the United States for the Northern District of Texas, together with a general denial of the allegations of appellees' petition. The petition for removal appears in all things sufficient to show cause therefor, unless the fact that J. M. Tucker is a resident citizen of Palo Pinto County, Texas, will have the effect to prevent it, and as to this it was alleged in the petition for removal that said Tucker acted in said shipment as agent only of his co-defendant, and that appellees had fraudulently joined him in the suit for the sole purpose of preventing a removal of the cause to said United States Circuit Court. The bond for removal is regular in form and sufficient in amount and was duly approved by the judge of the state court. Nevertheless thereafter, on April 5, 1904, the same being the appearance day in said state court, the petition for removal upon appellees' insistence was overruled and the appellants named were required over their objection to prepare for trial. They thereupon on April 7, 1904, filed an amended answer in which they continued to protest against the trial court retaining jurisdiction but averred that the damages sued for was due to the negligence of the St. Louis & San Francisco Railway Company, and prayed that it be made a party. The cause was continued for the term therefor on application of the Texas & Pacific Railway Company; the St. Louis & San Francisco Railway Company made a party; and against it, by an amended answer filed November 9, 1904, the appellant first

named, still objecting to trial in the state court and reiterating acts of negligence before made, prayed for judgment in the
192 alternative for all damages caused by the negligence of the St. Louis & San Francisco Railway Company, for which appellees might recover against the Texas & Pacific Railway Company. The trial resulted in a judgment in favor of appellees against J. M. Tucker and the Texas & Pacific Railway Company for $3,600, and in favor of the Texas & Pacific Railway Company against the St. Louis & San Francisco Company for $1,800, and all parties against whom judgment was so rendered have appealed.

Our conclusion on the first question presented renders a further statement unnecessary.

Did the court err as assigned in refusing the petition for removal to the circuit court of the United States, and in entertaining jurisdiction of the case? We conclude that it did. Appellees make no objection to the sufficiency of the petition and bond for removal, and none is found. They seem in all respects to comply with the removal act of congress, and as before stated to entitle the Texas & Pacific Railway Company to the removal sought unless, as appellees insist, the joinder by them of J. M. Tucker, a citizen of Texas, without right of removal, alters the case. See Union Pacific Ry. Co. *v.* Meyers, 115 U. S. 1, L. Ed. Bk. 29, 1132, and Tex. & Pac. Ry. Co. *v.* Davis, 93 Texas, 378.

If it be assumed that the contention of appellees is applicable to this case and that their petition states a nonseverable joint cause of action against parties having a diverse citizenship, we nevertheless think it must be held that the petition for removal presents such *prima facie* right of the Texas & Pacific Railway Company as required the state court to make the order of removal. If, as the petition for removal in substance alleged, no cause of action against J. M. Tucker in fact existed and if his joinder was wrongfully made with the fraudulent purpose on appellees' part of depriving the Texas & Pacific Railway Company of its right to remove and
193 of defeating the jurisdiction of the circuit court, then the fact of *of* such joinder of Tucker with such purpose will not affect the right to remove or the jurisdiction of the circuit court. Texas & Pacific Railway Co. *v.* Bloom, 85 Texas, 279; Dillon's Removal of Cases, sec. 17; Arowsmith *v.* Nashville & D. R. Co. *et al.*, 57 Fed. Rep., p. 165, and authorities there cited. In the case last mentioned the circuit judge uses language and makes quotation as follows: "If, in point of fact, the plaintiff has no cause of action whatever against the resident defendant, and such defendant has been joined as a defendant with the sole purpose of defeating the right of the real defendant to remove the action against it to the circuit court of the United States, then such misjoinder operates as a legal fraud, and will not be permitted to deprive the nonresident defendant of its constitutional right of removal. The doctrine contended for was thus stated by Mr. Justice Miller: 'It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason

or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying the right.' Board of County Com'rs. *v.* Kansas Pac. Ry. Co., 4 Dill. 277.

"On the same subject, Judge Shiras, in Dow *v.* Bradstreet Co., said: 'The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the circuit court of the United States regard will be had only to the citizenship of the real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in, or actual connec-
194 tion with, the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the federal court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the constitution and laws of the United States, and it certainly must be true that it can not be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same state as the plaintiff.' 46 Fed. Rep., 827."

The issue presented and decided in appellees' favor by the trial court, whether Tucker was a false rather than a real party defendant and whether appellees' averments as to him were falsely and fraudulently made for the sole purpose of defeating the removal, was triable alone in the circuit court. The rule is that the state court can only determine as matter of law whether on the face of the record a right to removal is shown. If so, its jurisdiction ceases and it can proceed no further than to make the order of transfer. Crehare *v.* The Ohio & Mississippi Ry. Co., 131 U. S., 240, 33 L. Ed., 144. Burlington, C. R. & N. R. Co. *v.* Dunn, 122 U. S., 515, 30 L. Ed., 1159; Kansas City, Ft. S. & M. R. Co. *v.* Doughtry, 138 U. S., 298, 34 L. Ed., 963; Arrowsmith *v.* Nashville & D. R. Co. *et al.*, 57 Fed. Rep., 165; Sinclare *v.* Pierce, 50 Fed. Rep., 852; Dow *v.* Bradstreet Co., 46 Fed. Rep., 828; Texas & Pacific Ry. Co. *v.* Davis, 93 Texas, 386.

The authorities last referred to would seem to also conclude the remaining contention of appellees, to the effect that the right to remove—the jurisdiction of the circuit court—was waived by the appellant, the Texas & Pacific Railway Company, by its ac-
195 tion in seeking a continuance and in making the St. Louis & San Francisco company a party, and in seeking and receiving relief against it. The question of waiver is thus discussed by our Supreme Court in Texas & Pacific Railway Company *v.* Davis, *supra:* "But it is urgently insisted that the defendant, by its action in the state court, has waived its right of removal. The rule now well established is that the seasonable filing of a sufficient petition for removal, accompanied by a sufficient bond, tolls the jurisdiction of the state court and transfer it *eo. instanti* to the United States

court. It would seem, however, that since the right of removal is a more jurisdictional privilege, it might be waived even after it has been exercised, and the jurisdiction of the state court restored. An express waiver would accomplish this result; and it may be, also, that conduct on — part of the defendant inconsistent with the idea that he intends to insist upon the removal of the cause—especially when such conduct is prejudicial to the rights of the plaintiff—should be deemed a waiver. But that the defendant does not lose his right by defending the action with all the means in his power, in case the state court proceeds with the cause, is now the settled law." The Court then quotes from the case of the National Steamship Co. *v.* Tugman, 106 U. S., 118, and further say: "The language quoted clearly shows that by filing the petition and bond, the jurisdiction of the state court is gone, and aptly speaks of its jurisdiction as being 'restored.' It may be seen how an express agreement or an express waiver, which is practically the same thing, may restore the lost jurisdiction; but it is not evident that any other act done in the state court, after it has lost all power over the case, should have effect. It would seem, as intimated in the language just quoted, that, as a general rule, when the jurisdiction is once lost, it takes the
196 order of the United States court to restore it." See also Ry. *v.* Harrison, 73 Tex. 103.

In view of the record herein and of these expressions of our own Supreme Court we conclude that there was no waiver in this case. The doctrine implies that the party who has presented a proper petition and bond and fixed his right of removal has changed his purpose and consents to a restoration of the jurisdiction of the state court. This must be the essential fact to be proven by all evidence relied upon as establishing a waiver, whether the waiver be express or implied. The character of the evidence may be different but the end to be attained is the same. In this case it was only after the petition for removal had been denied that the Texas & Pacific Railway Company sought a continuance or sought to make the other railway company a party. It is evident from the record that this was but an effort on the part of the first named company to relieve itself, in whole or in part, from impending danger. In its answer seeking to make the St. Louis & San Francisco company a party defendant, and in its amended answer declaring against it and upon which the trial proceeded, express protest was made against the state court further proceeding, thus pointedly negativing any change of purpose or consent on the part of the petitioner to waive its right of removal. Nor is such consent or waiver the necessary implication from the remainder of the answer. The declaration against the St. Louis & San Francisco Railway Company, is not absolute. It is conditional only. The prayer is in the alternative. It was for such damages alone as appellees might recover from the Texas & Pacific Railway Company that resulted from the sole negligence of the St. Louis & San Francisco Railway Company.

We conclude that the court erred in denying the petition for removal of this case to the circuit court, and in proceeding with the

trial. This conclusion renders other questions immaterial,
197 and the judgment will therefore be reversed and the cause remanded for proceedings in accord herewith.

CONNER,
Chief Justice.

Endorsed: No. 4908. Texas & Pacific Ry. Co., Appellant, *vs.* Eastin & Knox, Appellees. Reversed and Remanded. Opinion by Conner, Chief Justice. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, July 1, 1905. W. C. Strong, Clerk. With App. No. 4846. Filed in Supreme Court Nov. 24, 1905. F. T. Connerly, Clerk.

Judgment.

Entered July 1, 1905.

No. 4908.

TEXAS & PACIFIC RY. CO. ET AL.
vs.
EASTIN & KNOX.

From District Court of Parker County.

JULY 1, 1905.

Opinion by Mr. CONNER, *Ch. J.:*

This cause came on to be heard on the transcript of the record and the same being inspected because it is the opinion of the court that there was error in the judgment; it is therefore considered, adjudged, and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; that the appellees S. W. Eastin and D. L. Knox pay all costs incurred by reason of this appeal and this decision be certified below for observance.

Appellees' Motion for Rehearing.

Filed July 15, 1905.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

198 TEXAS & PACIFIC RAILWAY COMPANY, Appellant,
vs.
EASTIN & KNOX, Appellees.

Appeal from the District Court of Parker County.

Application for Rehearing.

Now comes the appellees, Eastin & Knox, in the above styled and numbered cause, and moves the court to set aside the judgment here-

tofore rendered in this cause reversing and remanding the judgment of the court below, and to grant a rehearing, and affirm the judgment of the court below for the following reasons, to wit:

First Assignment of Error.

This court erred in holding that the District Court should have removed this cause to the Federal Circuit Court.

Statement.

The petition and bond for removal was filed on April 5th., 1904. On April 7th., 1905, the T. & P. Ry. Co. filed what it called its "1st. Amended Original Answer" (Tr. p. 27;) while purporting to be an answer, it sets up a cause of action against the St. L. & S. F. Ry. Co., which is therein termed the "Frisco," and prays the state court that citation issue to it and that it be made a defendant, and to require it to answer in the case, and that on trial, should appellees recover, that this appellant have judgment against said railway Company for all such damages as were caused by it. (Tr. p. 30.) In this pleading, strangely called an Answer, there is no prayer or relief asked for against Appellees. It is simply an application to the State Court to have a new party made defendant and that the rights may be adjudicated. There is no part of said answer really directed against the appellees but the General Denial. Hence, it is not defensive at all.

199 But the T. & P. Ry. Co. did more than merely file said answer to make the "Frisco" a party defendant. It also made a motion to continue the case in order that service of citation could be had on the Frisco so that it could be required to answer at the next term of the State Court, and succeeded in obtaining this continuance. Citation was issued accordingly and served on the Frisco; and it answered at the next term. (See certified copies of the Order of Continuance and of citation filed herein as Supplemental transcript per agreement.) And it took its judgment against the Frisco for $1800.00, (Tr. p. 128).

The court of Civil Appeals found the above facts to be true.

Authorities.

See the authorities cited under the following assignments.

Counsel for appellee submits the following propositions under the first assignment as propositions and as assignments of error.

2nd Assignment of Error.

The court of Civil Appeals erred in holding that the District Court had no right to ascertain from the Plaintiffs' Petition, or complaint, whether or not a joint cause of action was stated against Tucker, the agent of the Texas & Pacific Railway Company at

Strawn, Texas. This was a question of law, and the district Court had the right to say whether the pleadings of the Plaintiffs alleged a joint liability of the Texas & Pacific Railway Company and their agent.

Statement.

The Plaintiffs' Original Petition undoubtedly states a joint cause of action. It shows positively that the loss resulting to the Appellee's cattle resulted solely and directly by their being misled and deceived by the actions and false statements and misrepresentations of the agent, Tucker; and in not shipping the cattle over the shortest and most direct route; and also in failing to bill and ship
200 them either by Fort Worth or Sherman over the Frisco.

The petition also alleged that Tucker was acting under agreement with, and instructions from, The Texas & Pacific Ry. Co.'s office; that he refused to comply with the duties that he owed to the appellees as the agent of a common carrier. That he was engaged in assisting the Texas & Pacific Railway Company in violating the law and in trying to prevent the appellees from having a through shipment of their cattle from Strawn, Texas, to Tulsa, I. T., over the most direct route and in the most expeditious manner. This action of Tucker was clearly willful and fraudulent.

The Court of Civil Appeals held that the District Court was bound solely by the petition for removal, regardless of the allegations in Appellee's Original Petition or complaint. Judge Conner in his opinion, says: "If it be assumed that the contention of appellees is applicable to this case and that their petition states a nonseverable joint cause of action against parties having a diverse citizenship, we nevertheless think it must be held that the petition for removal presents such *prima facie* right of the Texas & Pacific Railway Company as required the state court to make the order of removal. If, as the petition for removal in substance alleged, no cause of action against J. M. Tucker in fact existed and if his joinder was wrongfully made with the fraudulent purpose on appellees' part of depriving the Texas & Pacific Railway Company of its right to remove and of defeating the jurisdiction of the circuit court, then the fact of such joinder of Tucker with such purpose will not affect the right to remove or the jurisdiction of the circuit court." After quoting and citing authorities, the opinion continues, "The issue presented and decided in appellees' favor by the trial court, whether Tucker was a false rather than a real party defendant and whether appellees' averments as to him were false and fraudulently made for the sole purpose of
201 defeating the removal, was triable alone in the circuit court.

The rule is that the state court can only determine as matter of law whether on the face of the record a right to removal is shown. If so its jurisdiction ceases and it can proceed no further than to make the order of transfer."

Authorities.

Powers *v.* Chesapeake & O. R. Co., 169 U. S. 92.
C. & O. R. Ry. Co. *v.* Dixon, 179 U. S. 131.
Dougherty *v.* Yazoo & M. V. R. Co. *et al.* 58 C. C. A. 651.
American Bridge Co. *v.* Hunt, 64 C. C. A. 548.
Especially see, Oakley *v.* Goodnow, 118 U. S. 43, (30 L. Ed. 61).
Prov. Sav. Life Ass'n So. of N. Y. *v.* Ford, 114 U. S. 635 (29 L. Ed. 261).

3rd Assignment of Error.

This court erred in holding that the District Court, in ascertaining as a matter of law whether or not a joint cause of action was stated against the Agent Tucker and the Texas & Pacific Ry. Co. was bound solely by the allegations in the appellant Company's Petition for removal, and that this issue was triable solely in the Federal Court.

Statement.

Same as under the preceeding Assignment.

Authorities.

Same as under the preceeding Assignment.

4th Assignment of Error.

Said court erred in holding that the action of the Texas & Pacific Ry. Co. in making the St. Louis & San Francisco Ry. Company a party defendant and asking judgment over against it, was a defensive act and was not a waiver of its right to remove this cause to the Federal Circuit Court for trial.

Statement.

The opinion in this case uses the following language:

202 "In view of the record herein and of these expressions of our own supreme Court we conclude that there was no waiver in this case. The doctrine implies that the party who has presented a proper petition and bond and fixed his right or removal has changed his purpose and consents to a restoration of the jurisdiction of the state court. This must be the essential fact to be proved by all evidence relied upon as establishing a waiver, whether the waiver be expressed or implied. The character of the evidence may be different but the end to be attained is the same. In this case it was only after the petition for removal had been denied that the Texas & Pacific Railway Company sought a continuance or sought to make the other railway company a party. It is evident from the record that this was but an effort on the part of the first named company to relieve itself, in whole or in part, from impending danger. In its

answer seeking to make the St. Louis & San Francisco Company a party defendant, and in its amended answer declaring against it, and upon which the trial proceeded, express protest was made against the State court further proceeding, thus pointedly negativing any change of purpose or consent on the part of the petitioner to waive its right of removal. Nor is such consent or waiver the necessary implication from the remainder of the answer. The declaration against the St. Louis & San Francisco Railway Company is not absolute. It is conditional only. The prayer is in the alternative. It was for such damages alone as appellees might recover from the Texas & Pacific Railway Company that resulted from the sole negligence of the St. Louis & San Francisco Railway Company."

Authorities.

West Virginia *v.* King, 112 Fed. 369.
Hudson R. R. Co. *v.* Day, 54 Fed. 545.
Case *v.* Alney, 106 Fed. 433.
Amy *v.* Manning, (Mass.) 10 N. E. 742.
First National Bank, Wason, *v.* Conway, 67 Wis. 210 (30 N. W. 515).
Eustis *v.* Bolles, 150 U. S. 361.
Clay *v.* Smith, 3 Pet. 411.
Manning *v.* Amy, 140 U. S. 137.
Rosenthal *v.* Coats, 148 U. S. 142.

203 *5th Assignment of Error.*

The court erred in reversing and remanding the said cause because the Plaintiffs' Original Petition stated a joint action against the appellants, and Tucker being a resident of the State and the allegations in said petition showing that the action against him was real and not fraudulent, said Tucker not having any defense depending on the Federal law or under the constitution etc.

Statement.

See Plaintiffs' Original Petition and statements under the previous assignments; also Finding of Facts by the Court of Civil Appeals.

Authorities.

T. & P. Ry. Co. *v.* Huber, 75 S. W. 547.

6th Assignment of Error.

This court erred in holding that after the Texas & Pacific Company had voluntarily made the St. Louis & San Francisco Ry. Co. a party defendant, after it had filed its petition and bond for removal, it could then remove this case to the Federal Court; and that, too, without the Frisco joining in the said petition to remove, as all the defendants should have joined in the petition for removal.

Statement.

The "Frisco" never joined in the petition to remove. (Tr. pp. 14-18.)

Authorities.

C. R. I. & P. Ry. Co. *et al. vs.* Martin, 178 U. S. 245.
T. & P. Ry. Co. *v.* Yound, 27 S. W. 145.

Appellees represent that H. C. Shropshire, who resides in Parker County, Texas, is the attorney of record of the appellants, The Texas & Pacific Railway Company and J. M. Tucker, and that Messrs. West, Chapman & West, who reside in Tarrant County, Texas are the attorneys of record of the appellant, the St. Louis & San
204 Francisco Railway Company.

Wherefore appellees pray that notice according to law be given of this application, and that, on hearing hereof, the judgment reversing the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellees' original brief.

THOS. D. SPORER,
Attorney for Appellees, Eastin & Knox.

Post Office, Jacksboro, Texas.

Endorsed: No. 4597.—4908. In the Court of Civil Appeals for the Supreme Judicial District of Texas, at Fort Worth. Texas & Pacific Railway Co. *et al.*, Appellants *vs.* Eastin & Knox, Appellees. Motion for Rehearing. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, July 15, 1905. W. C. Strong, Clerk.

Order Overruling Appellees' Motion for Rehearing.

October 21, 1905.

No. [illegible]7, 4908.

Texas & Pacific Ry. Co. et al.
vs.
Eastin and Knox.

October 21, 1905.

This day came on to be heard the motion by the appellees for rehearing in this cause and the same having been duly considered by the court it is overruled.

205 PROCEEDINGS IN THE SUPREME COURT OF TEXAS.

(On First Writ of Error.)

Petition for Writ of Error.

Filed Nov. 24, 1905.

In the Supreme Court of the State of Texas.

EASTIN & KNOX, Plaintiff in Error,

vs.

TEXAS & PACIFIC RAILWAY CO. ET AL., Defendants in Error.

Appealed from the District Court of Parker County, Texas.

Judgment reversed and the cause *rendered* by the Court of Civil Appeals for the second Supreme Judicial District, at Fort Worth, and appellee's motion for hearing overruled.

Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Your petitioners, Eastin & Knox, a partnership composed of S. W. Eastin and D. L. Knox, respectfully represent that, in the above styled and numbered cause, on the 1st day of July, A. D. 1905, the Court of Civil Appeals, at Fort Worth reversed and remanded said cause and thereafter, in due time, your petitioners filed their application for a rehearing in said court of civil appeals, which application was thereafter by the said court overruled and denied.

1.

Petitioner further represents to the court, that the said judgment of the court of civil appeals practically settles the case; and,

2nd.

And that this decision of said Court of Civil Appeals for the said second district is in conflict with the decision rendered by the court of civil appeals for the 5th Judicial District, at Dallas, Texas,
206 in the case of Texas & Pacific Ry. Co. *v.* Huber, *et al.*, reported in the 75th S. W. Rep. on page 547.

That both of these propositions will appear to this Honorable Court from the following statement of the case:

The petition charges, in substance, appellees sued appellants, the T. & P. Ry. Co. and J. M. Tucker, its agent at Strawn, Texas, for willfully billing, routing and shipping 712 head of cows and calves, or 18 cars, from Strawn via Paris, Texas and *Mount*, Mo., to Tulsa, I. T., a distance of 678 miles, instead of sending them to Fort Worth, or Sherman and then delivering them to the railroads composing the

"Frisco" as requested by them, and which they vainly tried to get them to do. The distance to Tulsa from Strawn, via Fort Worth and Sherman over the Frisco, was only 392 miles; even over the T. & P. line via Sherman and thence over the Frisco to Tulsa was only 392 miles; and had their cattle been billed, routed and shipped via either of the two latter routes they would only have traveled 392 miles. As it was, they were billed and routed and did travel 288 miles more than they should, caused by Appellant's wilful, unreasonable and unlawful action in the premises.

Appellees also alleged that Tucker failed to perform his duty as an agent of his co-defendants a common carrier by refusing to bill, route and ship their cattle over the shortest and most direct and expedi-ous route as directed by appellees; but was governed by some secret agreement and conspiracy with said Railway Company or instruction from its officers, to route and ship all cattle that should be tendered to him over that line or route that would bring the most freight or revenue to the Company, etc.

Petitioner further alleges that prior to the said 2nd day of April, 1902, Plaintiffs notified said agent at said Strawn that they desired to ship the said cattle to said Tulsa, I. T., and for him to have
207 a sufficient number of cars ready on said date, so that the said cattle would not be delayed at said Strawn. That Plaintiff prior to that time had made arrangements with the St. L. & S. F. Ry. Co., to ship said cattle from Strawn to Fort Worth, and thence over the line of the Red River, Tex. & So. Ry. Co., and over the said St. L. & S. F. Ry. Co. to Tulsa, I. T., the shortest and most direct route from Strawn to Tulsa. And that Plaintiff on that day delivered to defendant Tucker, for said Defendant Co., 615 head of cattle and 97 head of calves, of the total value of $12,880.00 to be transported as aforesaid. (Tr. p. 2.)

That after said cattle were about all loaded on the cars, the Defendant, Tucker, notified Plaintiffs that they were to sign bill of lading or contract which billed or routed these cattle over the line of Defendant Company to Paris, Tex., and thence over said St. L. & S. F. Ry. Co. to Monette, Mo., and thence in a South Westerly course down to Tulsa, I. T. Plaintiffs objected to said cattle being transported that way and insisted that they be taken to Fort Worth or to Sherman, and there be delivered to said Red River, Tex. & So. Ry. Co., which connects with said St. L. & S. F. Ry. Co., at the N. B. Line of Texas, but said agent absolutely refused to bill said cattle that way, and said that they would not be shipped to Tulsa in any other way than they way they had been billed, and that they had to go that way or not at all.

The said cattle were stock cattle, and as such were in good condition but could not stand to be driven around the country, or hauled about or handled unnecessarily. (Tr. p. 3.)

That the Plaintiffs had no pasture at or near Strawn in which to place said cattle, and that they, at great expense, had leased a pasture in the I. T., near Tulsa. That of all these facts the
208 agent had been notified and that he also knew that they were compelled to ship said cattle on that day etc., and that Plain-

tiffs at the time they drove the cattle to Strawn for shipment supposed they would be shipped over the most direct line and had no idea that they would be transported via Paris and Monette. And that they signed said bill of lading under duress and protested thereto as well as their being billed as the agent had done. (Tr. p. 4.) That said cattle could have been billed, either via Fort Worth, or Sherman, as the Defendant Company connected with the Red River, Tex. & So. Ry. Co., and the St. L. & S. F. Ry. Co., at those places, and this was the most direct, shortest and most expeditious route; but said agent refused to bill said cattle that way and represented to Plaintiffs that the Defendant Company's line did not connect with the Red River, Tex. & So. Ry. Co. at Fort Worth, and that he could not route said cattle via Fort Worth. That such statements were false and untrue and were solely for the purpose of compelling Plaintiffs to have their cattle transported over Defendant Co.'s line from said Strawn via Paris, in order that Defendant Company might receive more freight.

Plaintiffs charge that there was a secret agreement between said agent and Defendant Company to the effect that all freight, especially live-stock, which said Tucker should receive should be transported over the Defendant's line as much as possible, so that they would get more of the freight charges, regardless of the interest of the shipper. (Tr. p. 6.) And that Defendant Tucker had no regard in billing said cattle for the interest of Plaintiffs, of what expense and cost they would incur, or the consequences that would result to said cattle by being transported such a long, indirect and circuitous route.

That he totally and recklessly disregarded the duty that he, as the agent of said defendant Company, as a common carrier,
209 owed to the Plaintiffs to receive and transport the said cattle in the most direct and practicable route and manner and in the least expensive way. That he also recklessly ignored the duty that the Defendant Company owed to these Plaintiffs as a common carrier in the transportation of said cattle over the lines and in the manner aforesaid. That he showed a total indifference to the rights and interest of Plaintiffs in the shipment, routing and transportation of said cattle, and that he was controlled entirely by what he thought was to the interest of the Company and as to the amount of freight the said defendant company would receive out of the shipment and transportation of said cattle. (Tr. p. 7.)

That had the cattle been billed via Fort Worth or Sherman, they would have made the trip in fifteen (15) hours; that as it was, it took them sixty hours. And by reason of being shipped in this indirect manner, they had to do without feed and stand in muddy pens and were jostled and skinned and bruised and treated in such a rough manner that many of said cattle lost their calves and were ruined and not able to recuperate so as to be of much value. (Tr. pp. 8 and 9.)

That about 550 head of said cattle were cows and by reason of this rough treatment, Plaintiff lost almost the entire calf crop. (Tr. p. 11.)

That by this wilful action of said agent in billing these cattle as

he did, appellee's cattle were compelled to go the longer route—by twice as far—and were very seriously injured and damaged.

The petition of Plaintiffs in error makes a joint cause of action against the said Tucker and the defendant Company as is clearly seen from the foregoing statement taken from their original petition. The Appellant, T. & P. Ry. Co., sought to remove the cause to the Federal Court on the ground that it was a Federal Corpora-
210 tion; and filed its petition and bond for removal on April 5th, 1904. On April 7th, 1905, the T. & P. Ry. Co. filed what it called "its Amended Original Answer" (Tr. p. 27); while purporting to be an answer, it sets up a cause of action against the St. L. & S. F. Ry. Co., which is therein termed the "Frisco," and prays the State Court that citation issue to it and that it be made a defendant, and to require it to answer in the case, and that on trial, should appellants recover, that this appellant have judgment against said railway company for all such damages as were caused by it (Tr. p. 30). In this pleading, strangely called and Answer, there is no prayer of relief asked for against Appellees. It is simply an application to the States Court to have a new party made defendant and that the rights may be adjudicated. There is no part of said answer really directed against the appellees but the General Denial. Hence, it is not defensive at all.

But the T. & P. Ry. Co. did *more* than merely file said answer to make the "Frisco" a party defendant. It also made a motion to continue the case in order that service of citation could be had on the Frisco so that it could be required to answer at the next term of the State Court, and succeeded in obtaining this continuance. Citation was issued accordingly and served on the Frisco; and it answered at the next term. (See certified copies of the order of continuance and of citation filed herein as supplemental transcript per agreement.) And it took its judgment against Frisco for $1800.00 (Tr. p. 128).

The Court of Civil Appeals found the above facts to be true.

The trial resulted in a verdict and judgment for $3600.00 in favor of Plaintiffs, and the Defendant Company recovered judgment over against St. L. & S. F. Ry. Co. for $1800.00. All the defendants appealed and the Court of Civil Appeals held that the District Court should have removed the cause to the Federal Court. This
211 decision, as before stated, is in conflict with the decision in the case of T. & P. Ry. Co., *et al., vs.* Huber reported in 75th S. W. Rep. p. 547.

This decision of the Court of Civil Appeals, also practically settles the case, because as stated by counsel for Defendants in error, they filed their transcript in the Federal Court at Fort Worth, and had the case dismissed for want of prosecution; and the Plaintiffs' case is now barred by limitation. (See P. P. 10-11—Brief of Counsel for the defendant Company.)

But whether or not Plaintiffs can now take our a transcript and file the same in the Federal Circuit Court at Fort Worth, and prosecute this suit; it is certainly settled as far as the jurisdiction of the

lower court is concerned; and Plaintiffs in error respectfully submit that this court has jurisdiction to hear and grant this writ of error.

Hence, your petitioner now applies to the Supreme Court for a writ of error to the end that said court may review the said cause and the action of the court of civil appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioner assigns the following errors committed by the Court of Civil Appeals in reversing said judgment and *reversing said judgment and* remanding said cause, and in refusing a rehearing, and are the assignments of error contained in motion for rehearing filed by Plaintiffs in error in the Court of Civil Appeals, to-wit:

First Assignment of Error.

This Court erred in holding that the District Court should have removed this cause to the Federal Circuit Court.

Statement.

The Court is respectfully referred to statement previously made, and it is unnecessary to reiterate the same here.

212 Authorities.

T. & P. Ry. Co. *v.* Huber, *et al.* 75 S. W. 547.

That the mere allegation of fraudulent joinder of defendants where Plaintiffs' petition shows cause of action against defendant is insufficient. See Ayles *v.* So. Ry. Co. 88 S. W. 1048. Southern Ry. Co. *v.* Sittasen 74 N. E. 898. The petition for removal does not deny the truth of the allegations in Plaintiffs' petition but avers that they do not state a cause against agent Tucker, and that the joinder of him was fraudulent to prevent removal.

Remarks: The court of Civil Appeals in their opinion do not refer to the decision rendered by the Court for the 5th. District in the Huber case; but they seem to base their reason for reversing the judgment of the lower court on the fact that the verified petition for removal alleged that the agent Tucker was merely joined as a defendant fraudulent to prevent the removal of the cause to the Federal Court, and held that this mere allegation deprived the District Court of jurisdiction, and for this reason alone, the case should have been removed.

For further discussion of this phase of the case, see 2nd. assignment of error.

Counsel for appellees' submits the following propositions under the first assignment as propositions and as assignments of error.

2nd Assignment of Error.

The Court of Civil Appeals erred in holding that the District Court had no right to ascertain from the Plaintiffs' petition or complaint, whether or not a joint cause of action was stated against

Tucker, the agent of the Texas & Pacific Railway Company at Strawn, Texas. This was a question of law, and the District Court had right to say whether the pleadings of the Plaintiffs alleged a joint liability of the Texas & Pacific Railway Company and their agent.

213 Statement.

The Plaintiffs' original petition undoubtedly states a joint cause of action. It shows positively that the loss resulting to appellees' cattle resulted solely and directly by their being misled and deceived by the actions and false statements and misrepresentations of the agent, Tucker; and in not shipping them over the shortest and most direct route; and also in failing to bill and ship said cattle either by Fort Worth or Sherman over the Frisco. The petition also alleged that Tucker was acting under agreement with, and instructions from, the Texas & Pacific Ry Co.'s office; and he refused to comply with the duties that he owed to appellees as the agent of a common carrier. That he was engaged in assisting the T. & P. Ry. Co. in violating the law and in trying to prevent the appellees from having a through shipment of their cattle from Strawn, Texas, to Tulsa, I. T., over the most direct route and in the most expenditious manner. This action of Tucker was clearly willful and fraudulent.

The Court of Civil Appeals held that the District Court was bound solely by the petition for removal, regardless of the allegations in Appellees' Original Petition or Complaint. Judge Conner in his opinion, says: "If it be assumed that the contention of appellees is applicable to this case and that their petition states a nonserverable joint cause of action against parties having a diverse citizenship, we nevertheless think it must be held that the petition or removal presents such *prima facie* right of the Texas & Pacific Railway Company as required the State Court to make the order of removal. If, as the petition for removal in substance alleged, no cause of action against J. M. Tucker in fact existed and if his joinder was wrongfully made with the fraudulent purpose on Appellees' part of depriving the Texas & Pacific Railway Company of its right to remove and of defeating the jurisdiction of the circuit court." After quoting and citing authorities, the opinion continues, "The issue
214 presented and decided in appellees' favor by the trial court, whether Tucker was a false rather than a real party defendant and whether appellees' averments as to him were false and fraudulently made for the sole purpose of defeating the removal, was triable alone in the circuit court. The rule is that the State Court can only determine as matter of law, whether on the face of the record a right to removal is shown. If so, its jurisdiction ceases and it can proceed no further than to make the order of transfer."

Authorities.

Chicago, R. I. & P. Ry. Co. *v.* Martin 178 U. S. 245.

Remarks: In the Martin case above cited, Justice Fuller quotes with approval the following from Little Yk. Gold &c. Co. *v.* Keyes, 96, U. S. 199:

"Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,'—such as is required in good pleading, * * * that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." Blackburn *v.* Portland Gold Min. Co. 175 U. S. 571, ante, 276, 20 Sup. Ct. Rep. 222.

5th Assignment of Error (4th in Motion for Rehearing).

The Court erred in holding that the action of the Texas & Pacific Ry. Co. in making the St. Louis & San Francisco Ry. Company a party defendant and asking judgment over against it was a defensive act and was not a waiver of its right to remove this cause to the Federal Circuit Court for trial.

Statement.

Reference is here made to the previous statements espe-
215 cially in the beginning of this application.

Authorities.

Chicago, I. & N. P. Ry. Co. *v.* Minn. & N. W. R. Co. 29 Fed. 337. West Virginia *v.* King, 112 Fed. 369. Hudson R. R. Co. *v.* Day 54 Fed. 545. Case *v.* Alley, 106 Fed. 433. Amy *v.* Manning, (Mass) 10 N. E. 742. First National Bank, Wason, *v.* Conway, 67 Wis. 210. (30. N. W. 515.) Eustis *v.* Bolles, 150 U. S. 361. Clay *v.* Smith 3 Pet. 411. Manning *v.* Amy, 140 U. S. 137. Rosenthal *v.* Coats, 148 U. S. 142. Dart *v.* Ames 19 Howard Prac. 429. Hanover Nat'l Bank *v.* Smith, 13 Blatchf. (224 Fed. Case, No. 6035.)

Remarks: According to the opinion in this case the Defendant Co., after the filing of its petition and bond for removal had the right to take any action it chose to protect itself, whether the same was defensive or not. This Plaintiff contended and now contends that the defendant was confined after it filed its petition and bond for removal to merely defensive acts; and that it could not appeal to the State Court for any relief against a third party whom it may have a cause of action against in the event the Plaintiffs recovered against it. It could not continue this case to inject a third party into this case for the purpose of protecting itself against a judgment that the Plaintiffs might recover against it. By its own action it deprived the State Court of Jurisdiction over the case and it could not turn around and ask the Court to retain the case and give it an oppor-

tunity to secure a judgment against a party with whom the Plaintiff had no controversy. This would inject a new cause into this case, with a wholly different state of facts and rights, with which the plaintiffs had no concern. It had said to the State Court, "Hands Off," and had appealed to the Federal Court for protection, and to that court alone, it had to go if it desired a judgment over against the "Frisco" Ry Co. That Court had acquired jurisdiction by
216 the action of Defendant Company, and it was competent to grant full protection to it.

But it ignored the Federal Court entirely and appealed to the State Court for relief independent of the Plaintiffs' cause of action, and against a party with whom the Plaintiff- had no controversy, and who was not even a party to the suit. By this action it continued the case, over the objection of Plaintiffs, made the Frisco a party-defendant, forced it to attend and in doing this necessarily compelled the incurring of a large amount of cost that the Plaintiffs must pay. In taking this action, the Defendant Company was bound to know the expenses it incurred would be large, and that Plaintiff had the right to rely upon this action as a waiver of its right of removal and to have the case tried by the Federal Court. This action was as clearly as strong a waiver as if it had made an express stipulation in writing to that effect. It could not, and it cannot now, be construed into anything else but a direct waiver. "Having thus experimented upon the merits of the cause in the district court, and proposing, by persisting in the appeal, to further experiment upon the merits of the cause in the supreme Court of the state, it is not open to defendant to also experiment in this court upon the merits of the same cause." 29 Fed. 337.

6th Assignment of Error.

The court erred in holding that after the Texas & Pacific Company had voluntarily made the St. Louis & San Francisco Ry. Co. a party defendant, after it had filed its petition and bond for removal, it could then remove this case to the Federal Court; and that, too, without the Frisco joining in the said petition to remove, as all the defendants should have joined in the petition for removal.

Statement.

The "Frisco" never joined in the petition to remove. (Tr. p. 14-18).

217 Authorities.

C. R. I. & P. Ry. Co. *et al. v.* Martin, 178 U. S. 245.
T. & P. Ry. Co. *v.* Young, 27 S. W. 145.

Your petitioner represents that H. C. Shropshire, who resides at Weatherford, in Parker County, Texas, is the attorney of record of the appellants, now Defendants in Error.

Wherefore petitioner prays for a writ of error in said cause to the end that said cause may be brought before this Court, and the aforesaid errors reviewed and corrected.

THOS. D. SPORER,
Attorney for Plaintiffs in Error.

Post-office: Jacksboro, Texas.

Now comes Thos. D. Sporer, and states to the Court that the decision of the Court of Civil Appeals in the above numbered and entitled cause, practically settles the case. And he further shows to the Court that he desires to argue this case and prays that such time may be granted him for that purpose, and that the court set a day in which such argument may be heard.

THOS. D. SPORER,
Attorney for Plaintiffs in Error.

Endorsed: Application No. 4847. In the Supreme Court of the State of Texas. Eastin & Knox, Plaintiffs in Error, *vs.* Texas & Pacific Railway Co. *et al.*, Defendants in Error. Petition for writ of Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas Nov. 20, 1905. W. C. Strong, Clerk. Filed in Supreme Court of Texas, Nov. 24, 1905. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Dismissed W. O. J. granted. Thos. D. Sporer, Attorney at Law, Jacksboro, Texas.

218 *Order Dismissing for Want of Jurisdiction Petition for Writ of Error.*

Dec. 7, 1905.

App. No. 4846.

EASTIN & KNOX
vs.
T. & P. RY. CO. ET AL.

From Parker County, Second District.

This day came on to be heard the application of Eastin & Knox, for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be dismissed for want of jurisdiction; that the applicants, S. W. Eastin and D. L. Knox, pay all costs incurred on this application.

Motion for Rehearing.

Filed Dec. 21, 1905.

In the Supreme Court of the State of Texas.

No. —.

EASTIN & KNOX, Plaintiffs in Error,
vs.
TEXAS & PACIFIC RAILWAY COMPANY ET AL., Defendants in Error.

Motion for Rehearing.

Now comes plaintiffs in error, S. W. Eastin and D. L. Knox, in the above styled and numbered cause, and move the court to set aside the judgment rendered herein on December 15, 1905, by this court, dismissing the application of plaintiffs in error for want of jurisdiction, and to grant them a rehearing and reinstate said case for the following reasons, to-wit:

219 1st. Because this court erred in holding that the decision of the Court of Civil Appeals rendered in this cause did not practically settle the case and that for that reason this court had no jurisdiction to entertain the application for this writ of error.

2nd. Because this court erred in holding that the decision rendered herein by the Court of Civil Appeals of the Second District did not conflict with and materially differ from the ruling of the Court of Civil Appeals of the Fifth District in the case of Texas & Pacific Ry. Co. *vs.* Huber *et al.* reported in 75 Southwestern, 547.

For a statement of the facts under both of these assignments reference is made to the statement in the application for w-it of error by plantiffs in error, filed herein on November 24, 1905. From this statement it will appear that the plaintiffs in their original petition sought to hold said Railway Company and its agent, Tucker, jointly responsible for the wrongs committed by them and which resulted in much damage to the cattle of plaintiffs in wrongfully shipping their cattle from Strawn, Texas, to Tulsa, I. T. On filing the motion and bond for removal the district court held, as a matter of law, that the case was not removable to the Federal Court; and on the trial of the case rendered judgment against the defendants for $3600. The Court of Civil Appeals reversed the judgment of the district court on the ground that this court erred in not removing the case to the Federal Court.

The case of T. & P. Ry. Co. *v.* Huber *et al.* above referred to, was an action brought against the T. & P. Ry. Co. and R. J. Oliphant, the engineer, (who was operating the engine at the time that Huber was run over and killed by the engine,) to recover damages by reason of said killing, which it was alleged was caused by the negli-

gence of said Oliphant in operating, as an employee of the
220 defendant, the said engine. The defendant sought to remove the case to the U. S. Circuit Court at Dallas on the ground that the Texas & Pacific Railway Company was a Federal corporation. The petition to remove was denied, to which exceptions were taken and the case appealed to the said Court of Civil Appeals for the Fifth District and this court held that the case was not removable because Oliphant had no right or defense depending on a Federal law. The question in that case was the very question decided in this case; that is, can the Texas & Pacific Railway Company, or any other corporation chartered by Federal law, when sued jointly with one, as in both of these cases, (an employé), who has no right depending on the Federal law, remove the case from a state court to a Federal court.

Since the application and argument for writ of error was filed in this case the Court of Civil Appeals of the Fourth District has also held, in the same case, Texas & Pacific Railway Co. *v.* Huber *et al.*, that the Texas & Pacific Railway Company could not remove the case into the Federal court because Oliphant, its engineer, was sued with it, and he had no right depending on a Federal law. The opinion of the Court of Civil Appeals of the Fourth District in said case is filed with the clerk of this court and this court is respectfully referred thereto. Hence we have two Courts of Civil Appeals conflicting directly with the decision rendered by the Court of Civil Appeals of the Second District in this case. The conflict is sharp and decisive and cannot be explained away. While not on the same statement of facts, the facts are similar; the employé sued in this case was a freight agent, and, in the other, he was an engineer.

Counsel for plaintiffs in error will file a written argument in connection with this motion for rehearing, and respectfully ask the court to consider the same in connection herewith.

221 Plaintiffs in error represent that H. C. Shropshire, who resides in Weatherford, Texas, is the attorney of record for the defendants in error, Texas & Pacific Railway Company and J. M. Tucker.

Wherefore plaintiffs in error pray that notice according to law be given of this application and that on a rehearing hereof judgment dismissing this cause be set aside and a rehearing granted; and that further proceedings be had herein as prayed for in plaintiffs' application for writ of error and in their original brief.

THOS. D. SPORER,
Attorney for Plaintiffs in Error.

Post-office, Jacksboro, Texas.

Endorsed: Mo. No. 1469. App. No. 4846. Eastin & Knox, Plaintiffs in Error, *vs.* Texas & Pacific Ry. Co. *et al.*, Defendants in Error. Motion for Rehearing. Filed in Supreme Court Dec. 21, 1905. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Granted.

Order Granting Motion for Rehearing and Application for Writ of Error.

Feb. 15, 1906.

Mo. No. 1469, App. No. 4846.

EASTIN & KNOX
vs.
T. & P. RY. CO. ET AL.

From Parker County, Second Dist.

This day came on to be heard the motion of applicants, Eastin & Knox, for a rehearing, and the same having been duly considered, because it is the opinion of this court that said motion ought to be sustained, it is therefore considered, adjudged and ordered that said motion for rehearing be granted; that the former judgment
222 of this court entered on to-wit, December 7th, 1905, dismissing for want of jurisdiction the writ of error herein, be vacated and set aside, and that the following judgment be entered in lieu thereof, to-wit:

This day came on to be heard the application of Eastin & Knox for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for upon the filing by the applicants of a bond in the sum of Two Hundred Dollars, conditioned to pay the costs of this court, the Court of Civil Appeals and District Court, payable to the adverse parties as prescribed by law.

Citation to Defendants in Error, The Texas & Pacific Railway Company and J. M. Tucker.

Issued February 22, 1906.

The State of Texas to the Sheriff or any Constable of Parker County, Greeting:

You are hereby commanded, by delivering to The Texas & Pacific Railway Company and J. M. Tucker, if found in your County, or to H. C. Shropshire, attorney of record, the accompan-ing certified copy of this writ, to summons said Texas and Pacific Railway Company and J. M. Tucker, to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Thursday, the 15th. day of March, 1906, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Thursday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Second Supreme Judicial District and

issued on the 22nd day of February, 1906, wherein Eastin
223 & Knox, a firm consisting of S. W. Eastin and D. L. Knox, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. Reuben R. Gaines, Chief Justice of the Supreme Court of Texas, the 22nd day of February, in the year of our Lord one thousand nine hundred and Six.

[SEAL.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Endorsed: No. —. In Supreme Court. Eastin & Knox, *vs.* Tex. & Pacific Ry. Co. *et al.* Citation. Issued February 22, 1906. F. T. Connerly, Clerk Supreme Court by J. S. Myrick, Deputy. Sheriff's Return. Received February 23, 1906. Executed February 24, 1906, by delivering to the within named H. C. Shropshire, Attorney of record, the accompaning certified copy of this writ. D. C. Bratton, Sheriff of Parker County. Fee $1.00.

Citation to the Defendant in Error, St. Louis & S. F. Ry. Co.

Issued February 22, 1906.

The State of Texas to the Sheriff or any Constable of Tarrant County, Greeting:

You are hereby commanded, by delivering to St. Louis & San Francisco Railroad Company, if found in your County, or to
224 West, Chapman & West, attorneys of record, the accompanying certified copy of this writ, to summons said St. Louis & San Francisco Railroad Company to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Thursday the 15th day of March, 1906, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Thursday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Second Supreme Judicial District, and issued on the 22nd day of February, 1906, wherein Eastin & Knox a firm consisting of S. W. Eastin and D. L. Knox are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. Reuben R. Gaines, Chief Justice of the Supreme Court of Texas, the 22nd day of February, in the year of our Lord one thousand nine hundred and six.

[SEAL.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Endorsed: No. 1537. In Supreme Court. Eastin & Knox, *vs.* Tex. & Pac. Ry. Co. *et al.* Citation. Issued February 22, 1906. F. T. Connerly, Clerk Supreme Court. By J. S. Myrick, Deputy. Sheriff's Return. Received 2-24-06. Executed 2-26-06, by delivering to the within named T. F. West, Attorney of Record, the accompanying certified copy of this writ. John T. Honea, Sheriff of Tarrant County. by R. S. Penn, Deputy. Fees $1.00; mileage 10¢,—$1.10.

225 *Order of Submission.*

March 15, 1906.

No. 1537.

EASTIN & KNOX
vs.
TEX. & PACIFIC RY. CO. ET AL.

From Parker County, Second District.

Submitted on briefs and orally for both parties.

Opinion.

Filed May 2, 1906.

No. 1537.

EASTIN & KNOX, Plaintiffs in Error,
vs.
THE TEX. & PACIFIC RAILWAY COMPANY ET AL., Defendants in Error.

From Parker County, Second District.

This suit was brought in the District Court of Parker County, Texas, by the plaintiffs in error against the Texas & Pacific Railway Company, a corporation chartered by virtue of an act of congress of the United States and J. M. Tucker, its agent, a resident of the State of Texas, to recover damages alleged to have resulted from the shipment of cattle from Strawn, Texas, a station on the line of the defendant company destined to Tulsa, Indian Territory, a station on the line of St. Louis & San Francisco Railway Company. It was alleged in the petition that the cattle were brought to Strawn and were delivered to Tucker, as the agent of the defendant Company to be shipped by the shortest and most expeditious route to the point named; that after the cattle had been about loaded on the cars, Tucker, then presented a bill of lading for the transportation of the cattle to Paris, Texas and thence over the lines of the St. Louis & San Francisco Railway Company to Monette, Missouri, and thence

to Tulsa. It was alleged that the plaintiffs declined to sign the bill of lading and demanded that the cattle should be carried over the Texas & Pacific railroad to Fort Worth or to Sherman and
226 thence over the Red River, Texas & Southern Railroad to its connection with the St. Louis & San Francisco railroad and thence by that railroad to the point of destination and that this was the shortest and most expeditious route; but that Tucker the agent positively refused to do this and that under certain circumstances alleged they were compelled to sign as demanded. The circumstances alleged were sufficient in our opinion to show that in signing the bill of lading the plaintiffs acted under duress. It was further averred in substance that by reason of the longer haul, the cattle were damaged and for this damage the suit was brought. In due time defendant, The Texas & Pacific Railway Company filed a petition for the removal of the cause to the Circuit Court of the United States. In this petition its co-defendant joined. The defendant Company in the first place claimed the right of removal by virtue of its incorporation under an act of the Congress of the United States and according to the decisions of the Supreme Court of the United States, would clearly have had the right had it been the sole defendant. It was alleged in the petition for removal that the defendant Tucker was fraudulently joined as a defendant for the purpose of preventing a removal to the United States Court. Since in our Opinion, the decision of the case in this Court depends upon the question of a fraudulent joinder we copy the allegations in the petition for removal in reference to that matter as follows: "This petition says that plaintiffs aver that J. M. Tucker, in shipping the cattle acted for an*f* was the agent of the Texas & Pacific Railway Company. This petitioner says that the said Tucker was its local station agent and acted for it as agent and not in any other capacity and was not and is not a proper party to this suit. The plaintiffs do not in their petition, state any cause of action against him. They improperly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, The Texas & Pacific Railway Company from removing this case to the United States Circuit Court, which said joinder of said J. M.
227 Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this defendant the Texas & Pacific Railway Company is a suit arising under the laws of the United States and more especially under the laws of the United States Constituting the Charter of this defendant and under which it was incorporated, that is to say, the said act of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railway Company and to aid in the construction of its road and for other purposes, and acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874. We think it clear that the joinder of a party in a suit of this character against whom no cause of action is alleged, presents no obstacle to a removal by a co-defendant who is sued alone would be entitled to

remove the case. But we understand the rulings of the Supreme Court of the United States where a cause of action is stated against a defendant, who is claimed to be made a party in order to defeat a removal, the petition must allege the facts which show the fraudulent purpose. For example if in this case the petition had alleged that the allegation in plaintiffs' petition, that Tucker was the agent of the defendant company in shipping the cattle, was not true and was fraudulently inserted in order to prevent a removal of the cause, it would have carried the case to the United States Court where, upon a denial of the fraud by the plaintiffs and a motion to remand, the issue would have been tried and determined" (Louisville etc. R. R. Co. *vs.* Wangelin, 132 U. S., 599; Chesapeake Ry. Co. *vs.* Dixon, 179 U. S. 131). But the petition for removal in this case contains no allegation of any fact whatever from which the conclusion can be reached that defendant Tucker was fraudulently joined
228 as a defendant. The statement of a conclusion of law is not sufficient. Therefore if the petition of the plaintiffs state a case which shows a cause of action against the defendant Tucker which case could be properly joined with the action against the defendant company the petition for removal was not sufficient to deprive the state court of its jurisdiction. It seems to us therefore, the questions to be determined are: Does the plaintiffs' petition state a cause of action against defendant Tucker? And was the plaintiff entitled to sue both defendants in the same suit? The first is the important question in the case here presented. Where the agent is empowered to perform duty for his principal and neglects to perform it and damage accrues from the failure, the agent is not responsible, though the principal may be. (Labadie *vs.* Hawley, 61 Tex. 177). But where the agent acting for his principal does a wrongful act and damage results to a third person, both are responsible. (Baker *vs.* Wasson, 53 Tex. 150). That there was a liability in the case made by the plaintiffs' petition, we have no doubt. The wrongful act was done by Tucker, the agent and for his act not only was he liable but his principal was liable because it was done in the prosecution of the company's business. They were joint tort feasons and were suable separately or jointly at the election of the plaintiff. That defendant Tucker could not give the United States Circuit Court jurisdiction of the Case by joining in the petition of its co-defendant we have this day decided in the case of the Texas & Pacific Railway Company against Huber. The Court of Civil Appeals as they had the right to do, in the exercise of a sound discretion when they reached the conclusion that the jurisdiction had been taken away, declined to pass upon the merits of the appeals. Until they have acted upon the others assignments of error in that Court, we cannot determine the case. (Oriental Investment Co. *vs.* Barclay, 93 Tex. 425). Therefore the judgment of the Court of Civil Appeals will be reversed and the cause remanded to that
229 Court for a decision of the other questions presented by the Appeal.

R. R. GAINES,
Chief Justice.

Opinion delivered May 2, 1906.

Endorsed: Eastin & Knox *vs.* Tex. & Pacific Railway Company *et al.* Opinion. Reversed and remanded to the Court of Civil Appeals. Filed in Supreme Court of Texas May 2, 1906. F. T. Connerly, Clerk. Gaines, Chief Justice.

Judgment.

Entered May 2, 1906.

No. 1537.

EASTIN & KNOX
vs.
TEX. & PACIFIC RY. CO. ET AL.

From Parker County, Second District.

Opinion delivered by Chief Justice GAINES:

This cause came on to be heard on writ of error to the court of Civil Appeals for the Second Supreme Judicial District, and the original transcript in said cause being before the court as well as the transcript showing the proceedings had in said court of Civil Appeals and these having been duly considered, because it is the opinion of this court that there was error in the judgment of the Court of Civil Appeals, it is therefore considered, adjudged and ordered that said judgment be reversed and the cause remanded to the Court of Civil Appeals for the Second Supreme Judicial District for further proceedings in accordance with the opinion of this court; that the defendants in error, Texas & Pacific Railway Company and J. M. Tucker pay all costs of this court by reason of this writ of error, and this decision be certified to the Court of Civil Appeals for the Second Supreme Judicial District for observance.

230 PROCEEDINGS IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT.

Judgment.

Entered June 16, 1906.

No. 4908.

TEX. & PACIFIC RY. CO. ET AL.
vs.
EASTIN & KNOX.

From District Court, Parker Co.

This cause having been certified back to this court by the Supreme Court with instructions to decide the same upon its merits and the

cause this day came on to be heard on the transcript of the record and the same being inspected because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the trial court's conclusions be and the same are hereby adopted and the judgment of the court below is in all things affirmed. That the appellees, S. W. Eastin and D. L. Knox do have and recover of and from the appellants, The Texas & Pacific Railway Company and its sureties Edw. O. Tennison and C. R. Buddy, the amount adjudged below in favor of said appellee against said Texas and Pacific Railway Company; It is further ordered, adjudged and decreed by the court that said Texas & Pacific Railway Company do have and recover of and from the appellant the St. Louis & San Francisco Railroad Company and its sureties, W. Scott and H. C. Holloway, the amount adjudged below in favor of the said Texas & Pacific Railway Company against the said St. Louis & San Francisco Railroad Company. It is further ordered that the said Texas & Pacific Railway Company and its said sureties, and the said St. Louis & San Francisco Railroad Company and its said sureties be taxed equally with the costs incurred in this behalf in this court and in the court below and that this decision be certified below for observance.

231 *Motion for Rehearing by T. & P. Ry. Co.*

Filed June 30, 1906.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Ft. Worth.

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS., Appellants,
vs.
EASTIN & KNOX, Appellees.

Application for Rehearing.

Now comes The Texas & Pacific Railway Company, one of the appellants in the above s-yled and numbered cause, and moves the court to set aside the judgment heretofore rendered in this cause on the 16th. day of June, 1906, affirming the judgment of the court below, and to grant a rehearing, and reverse the judgment of the court below, for the following reasons, to-wit:

First Assignment of Error.

Because the court erred in failing to sustain the first assignment of error of this appellant, which is as follows:

"The court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, filed in this court by this defendant, and its co-

defendant, J. M. Tucker, and for the reasons as is more fully shown by this defendant's bill of exceptions No. 1."

Second Assignment of Error.

Because the Court erred in failing to sustain the second assignment of error of this appellant, which is as follows:

"The judgment is contrary to law and unsupported by the
232 evidence in this: It appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written contracts the liability of this defendant, if any, was limited to such injuries and damage as might accrue to said cattle while they were in possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or deemed liable for any loss or damage sustained by Plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier, without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of railway did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad, or any line of railroad owned and operated by this defendant, after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control
of this defendant; that all the injury, loss and damage sus-
233 tained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carrier from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed the contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any authority to ship said cattle

upon through billing and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via. Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate, whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas."

Third Assignment of Error.

Because the court erred in failing to sustain the third assignment of error of this appellant, which is as follows:

234 "The judgment is contrary to law and unsupported by the evidence in this: There is no legal or sufficient evidence before the court showing the market value of the cattle in controversy at Tulsa, I. T., at the time of their arrival there, in the condition in which they were delivered at Tulsa, I. T., and there is no legal or sufficient evidence before the court showing the market value of such cattle at Tulsa, I. T., at the time of their arrival there, had the cattle been delivered at Tulsa, I. T. with due care and in proper condition; there is no legal or sufficient evidence before the court showing the difference between the market value of the cattle at Tulsa, I. T., at the time of their arrival there, in the condition in which they did arrive there, and the market value of said cattle at Tulsa, I. T., at the time of their arrival there had they been delivered there at said time in due time and in proper condition; wherefore the defendant says the judgment is excessive."

Fourth Assignment of Error.

Because the court erred in failing to sustain the fourth assignment of error of this appellant, which is as follows:

"The judgment is contrary to law and unsupported by the evidence in this: The judgment is excessive in this: It appears from the evidence that said cattle would naturally and necessarily have sustained some damage in the shipping and transportation of them from Strawn, Texas, to Tulsa, I. T., regardless of how they were handled upon the train and elsewhere during transportation; that only 29 head of said cattle were killed or died from injuries received while being carried and transported from Strawn, Texas, to Tulsa, I. T., and that the balance of the grown cattle, being some 585 head, were damaged to the extent of about five or six dollars per head; that of this number some 550 head were cows about all of which were with calves, and that a great number of said cows lost their calves

235 by reason of the treatment they received during the time they were being carried and transported upon the cars; that the

greater part of the damage and injury sustained by the cows which lost their calves was caused by reason of their having lost their calves; that at the time said cows were tendered and received by this defendant for shipment, and at the time said cattle were loaded upon defendant's cars and shipped by this defendant, and at the time and execution and making of the contracts upon which said cattle were shipped, this defendant did not know and was not informed that any of said cows were with calves, and there was nothing in the appearance of said cows which indicated to this defendant or its agent J. M. Tucker, that such cows were with calves. That plaintiffs do not plead or allege that this defendant was informed or knew that any of said cows were with calves or that there was anything in the appearance of said cows that indicated that any of said cows were with calves."

Fifth Assignment of Error.

Because the court erred in failing to sustain the fifth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the 29 head of said cattle were of the value of $20.00 per head, and that the balance of the grown cattle were damaged five dollars per head, and that plaintiffs were damaged in the sum of $3600.00."

Sixth Assignment of Error.

Because the court erred in failing to sustain the sixth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the balance of the grown cattle were damaged five dollars per head."

Seventh Assignment of Error.

Because the court erred in failing to sustain the seventh as-
236 signment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact, wherein it found as a matter of fact, that on or about the 18th. day of April, 1902, plaintiffs applied to the defendant, J. M. Tucker, agent of The Texas & Pacific Railway Company, at Strawn, Texas, for 18 stock cars, to be furnished at Strawn on the 22nd. of April, 1902, for the purpose of shipping 18 cars of cattle from said station of strawn on defendant's line of railroad to Tulsa, a station on the St. Louis & San Francisco Railroad in the Indian Territory. That the plaintiffs at the time of ordering said cars informed the defendant Tucker, as agent of The Texas & Pacific Railway Company, that they wished to ship their cattle from Strawn, to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. That said Tucker, as such agent, agreed to and did furnish said cars at Strawn on the 22nd. of April, 1902; because, first: Plaintiffs do not plead and allege in their peti-

tion that they did so inform the defendant Tucker, as agent of this defendant, at the time they ordered said cars that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company; 2nd; It appears from the evidence that the defendant Tucker, as agent of this defendant, did not agree to, and did not furnish said cars on the 22nd. day of April, 1902, for the purpose of shipping said cattle over the line of this defendant's road from Strawn, Texas, to Ft. Worth, Texas, and from there on over the line of the St. Louis & San Francisco Railroad Company to Tulsa, I. T.

Eighth Assignment of Error.

Because the court erred in failing to sustain the eighth as-
237 signment of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact that late in the evening of the 22nd. day of April, 1902, and after most of the cattle were loaded, the agent of the defendant, The Texas & Pacific Railway Company, the said J. M. Tucker, one of the defendants herein, presented to S. W. Eastin, one of the plaintiffs, the live stock contracts attached to the second amended original answer of the defendant Texas & Pacific Railway Company, for his signature, which contracts were for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over The Texas & Pacific Railroad to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa; that when said Eastin was informed that his cattle were routed by Paris, he objected, and stated that the route was much further than by way of Ft. Worth, and from there over the St. Louis & San Francisco railroad, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis and San Francisco railroad to Tulsa, I. T. Said agent Tucker then and there informed the plaintiff Eastin, that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn to Tulsa, I. T. over any other route except by its own line to Paris, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the purpose of getting his cattle shipped, signed said contract attached to said second amended original answer of the defendant, Texas & Pacific Railway Company; he did this unwillingly, because he thought that was the only means by which he could get his cattle shipped through
from Strawn, Texas, to Tulsa, I. T., on a through bill of
238 lading. That the plaintiffs had no place to put the cattle if they were not shipped through to Tulsa, I. T., near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only

means by which he could get his cattle shipped through to Tulsa; because, 1st; It appears from the evidence that at the time said contracts were presented to the plaintiff Eastin but little more than half of said cattle were loaded on the cars; 2nd: It appears from the evidence that said contracts only stipulated and provided for the transportation of said cattle from Strawn, Texas, over the road of this defendant to Paris, Texas, and did not stipulate and provide for the transportation of said cattle from there on over the St. Louis & San Francisco road to Tulsa, I. T.; 3rd: It appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest; 4th: It appears from the evidence that at said time the said J. M. Tucker, agent of this defendant, offered to route said cattle through via Sherman, Texas, or via Paris, Texas, and that said cattle were routed via Paris, Texas, under the direction and at the request and with the consent of plaintiffs."

Ninth Assignment of Error.

Because the court erred in failing to sustain the ninth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact that this defendant "could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road;" because, first: It appears from the evidence
239 that at the time of the shipment of said cattle this defendant did not have any arrangement or agreement with the said St. Louis & San Francisco road for the shipment and transportation of said cattle upon through billing and a through freight rate via St. Louis & San Francisco railroad from Ft. Worth, Texas, to Tulsa, I. T.: that at said time this defendant did not have any authority and was not authorized to route said cattle upon through billing and a through rate over the line of road of the said St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I T. 2nd: It appears from the evidence that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried and transported the same over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate."

Tenth Assignment of Error.

Because the court erred in failing to sustain the tenth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact "that the plaintiffs at the time of said shipment did not know that they could have their cattle shipped over the Texas & Pacific Railway to Sherman, and from there over the St. Louis & San Francisco Railroad; that the route via Sherman was as short as the one by Ft. Worth, and would have suited them,

the plaintiffs, as well as the way by Ft. Worth;" because, 1st: It appears from the evidence that at the time said cattle were received and shipped by this defendant, plaintiffs were told and informed by this defendant's agent, J. M. Tucker, that this defendant could and would bill and ship said cattle upon a through freight rate via Sherman, Texas; 2nd: there is no evidence before the court
240 showing or tending to show that the route via Sherman would have suited plaintiffs as well as the way by Ft. Worth, Texas."

Eleventh Assignment of Error.

Because the court erred in failing to sustain the eleventh assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact, wherein it found as a fact "that said shipping contracts were signed by the plaintiff Eastin by reason of duress, and for that reason, not binding on plaintiffs"; because, it appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest."

Twelfth Assignment of Error.

Because the court erred in failing to sustain the twelfth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a matter of fact that the said 'Tucker refused to route the said cattle through from Strawn to Tulsa, I. T. over any other route except by this defendant's own line to Paris, and from there on over the St. Louis & San Francisco road, to Tulsa, I. T.': because it appears from the evidence that the said Tucker offered to route said cattle through from Strawn to Tulsa, I. T., over this defendant's own line to Sherman, Texas."

Thirteenth Assignment of Error.

Because the court erred in failing to sustain the thirteenth assignment of error of this appellant, which is as follows:

"The court erred in its conclusions of law wherein it concludes that 'the fact that the defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damages
241 sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant, Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant, Texas & Pacific Railway Company, was not to be responsible for any injury occurring after said cattle left its line, will not relieve it, as said contracts are not binding on the plaintiffs by reason of duress'; because it appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of

said written contracts the liability of this defendant, if any, was limited to such injuries and damages as might accrue to said cattle while they were in possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or be deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, within a reasonable time, and did there deliver the said cattle to the next connecting carrier without loss or damage to plaintiffs, and that the defendant did protect the through rate of freight named in said contracts; that this defendant's line of railroad did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad or any line of railroad owned and operated
242 by this defendant after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier, and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the directions and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed said contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth Texas, to Tulsa, I. T.; that — said time this defendant was not authorized and did not have any authority to ship said cattle upon through billing, and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and

ship said cattle via Sherman, Texas, or Paris, Texas, upon
243 through billing and upon a through freight rate; whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas."

Fourteenth Assignment of Error.

Because the court erred in failing to sustain the fourteenth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact 'that the plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that defendant Tucker knew this fact; and find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa, over the St. Louis & San Francisco railroad, he would have shipped them that way, if defendant would have done so"; because, 1st: Plaintiffs do not plead and allege that the defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 2nd: There is no evidence before the court showing that defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 3rd: Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman, and from there over the St. Louis & San Francisco railroad if this defendant would have done so; 4th: There is no evidence before the court showing that plaintiffs would have shipped said cattle to Sherman, and from there over the St. Louis & San Francisco railroad to Tulsa if this defendant would have done so; 5th: It appears from the evidence that the defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. Louis & San Francisco railroad to Tulsa, I. T., but that plaintiff Eastin directed and requested defendant Tucker to
244 bill and ship said cattle to Paris, Texas."

Appellant represents that Thos. D. Sporer, who resides at Jacksboro, in Jack County, Texas, is the attorney of record for appellees, Eastin & Knox, and that West, Chapin & West, who reside at Ft. Worth, in Tarrant County, Texas, are the attorneys of record for the appellant, St. Louis & San Francisco Railroad Company.

Wherefore appellant prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellant's original brief.

H. C. SHROPSHIRE,
Attorney for Appellant,
The Texas & Pacific Railway Company.

Post-office address, Weatherford, Texas.

Endorsed: No. 4894/4908. In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth. The

Texas & Pacific Railway Company, *et als.*, Appellants, *vs.* Eastin & Knox, Appellees. Application for Rehearing by T. & P. Ry. Co. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas June 30, 1906. W. C. Strong, Clerk. Filed in Supreme Court Nov. 10, 1906. F. T. Connerly, Clerk. H. C. Shropshire, Attorney for T. & P. Ry. Co., Appellant.

Order Overruling Motion for Rehearing of T. & P. Ry. Co.

Oct. 13, 1906.

Nos. 4894, 4908.

Texas & Pacific Railway Co. et al.
vs.
Eastin & Knox.

This day came on to be heard the motion by the Texas &
245 Pacific Railway Company in this cause and the same having been duly considered, by the court is overruled.

Motion for Rehearing by J. M. Tucker.

Filed June 30, 1906.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Ft. Worth.

The Texas & Pacific Railway Company et als., Appellants,
vs.
Eastin & Knox, Appellees.

Application for Rehearing.

Now comes J. M. Tucker, one of the appellants in the above styled and numbered cause, and moves the court to set aside the judgment heretofore rendered in this cause on the 16th. day of June, 1906, affirming the judgment of the court below, and to grant a rehearing, and reverse the judgment of the court below, for the following reasons, to-wit:

First Assignment of Error.

Because the court erred in failing to sustain the first assignment of error of this appellant, which is as follows:

"The court erred in its conclusions of law, wherein the court concludes:

"The fact that the defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company, positively refused to route

the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred be-
246 yond the line of the defendant Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant Texas & Pacific Railway Company was not to be responsible for any injury occurring after the cattle left its line, will not relieve it, as such contract is not binding on the plaintiffs by reason of duress;" because, first: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts, and in the shipment of said cattle this defendant acted and contracted avowedly as the agent of his co-defendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle, and at the time of the shipment of said cattle it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant acted, and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; second: It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction and at the request and with the consent of plaintiffs; third: It appears from the evidence that on or about the 18th. day of April, 1902, plaintiffs' agent, Mr. Chase, called upon this defendant at the depot of the Texas & Pacific Railway Company at Strawn, Texas, and only stated to this defendant that he wanted him, this defendant, to get or have eighteen cars ready for the shipment of said cattle from Strawn, Texas, to Tulsa, I. T., on the 22nd. day of April, 1902, and for him to order said cars via Fort Worth, Texas, and the Frisco; that at said time nothing else was said about said cars, and that nothing was said by either this defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be shipped
247 and transported, or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., and that at said time this defendant did not agree to furnish said cars for the shipment and transportation of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of The Texas & Pacific Railroad and from Ft. Worth, Texas, over the line of the St. Louis & San Francisco Railroad Company; fourth: It appears from the evidence that said contracts only provided for the transportation of said cattle over the line of the Texas & Pacific Railroad from Strawn to Paris, and did not provide for the transportation of said cattle from Strawn to Tulsa, I. T., over The Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa, I. T.; that this defendant offered to bill and ship said cattle from Strawn, Texas, over the line of the Texas & Pacific Railway Company to Ft. Worth, Texas, upon a local rate of freight, or to bill and ship said cattle through upon through rate from

Strawn, Texas, over the line of The Texas & Pacific Railway Company to either Sherman, Texas, or Paris, Texas; and that plaintiffs signed said contracts willingly and without objection or protest; 5th: That at the time of the shipment of said cattle the defendant, The Texas & Pacific Railway Company, did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle upon through rate and billing over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., and that at said time The Texas & Pacific Railway Company was not authorized and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; and at said time the said St. Louis &
248 San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T., upon through billing and through rate; and there is no evidence before the court showing that this defendant owed plaintiffs any duty which he failed to perform."

Second Assignment of Error.

Because the court erred in failing to sustain the second assignment of error of this appellant, which is as follows:

"The court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas filed in this court by this defendant and his co-defendant, the Texas & Pacific Railway Company, and for the reasons as is more fully shown by this defendant's bill of exception No. 1."

Appellant represents that Thos. D. Sporer, who resides at Jacksboro, in Jack County, Texas, is the attorney of record for appellees, Eastin & Knox, and that West, Chapman & West, who reside at Ft. Worth, Texas, are the attorneys of record for the appellant, St. Louis & San Francisco Railroad Company.

Wherefore appellant prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellant's original brief.

H. C. SHROPSHIRE,
Attorney for Appellant J. M. Tucker.

Post office address, Weatherford, Texas.

Endorsed: No. 4895/4908. In the Court of Civil Appeals
249 for the Second Supreme Judicial District of Texas, at Ft. Worth. The Texas & Pacific Railway Co. *et als.*, Appellants, *vs.* Eastin & Knox, Appellees. Application for Rehearing. By J. M. Tucker. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas June 30, 1906. W. C. Strong, Clerk. Filed in Supreme Court Nov. 10, 1906. F. T. Connerly, Clerk. H. C. Shropshire, Atty, for J. M. Tucker, Appellant.

Order Overruling Motion for Rehearing of J. M. Tucker.

Oct. 13, 1906.

4895, 4908.

TEXAS & PACIFIC RAILWAY COMPANY ET AL.
vs.
EASTIN & KNOX.

OCTOBER 13, 1906.

This day came on to be heard the motion by J. M. Tucker for a rehearing in this cause and the same having been duly considered by the court is overruled.

Motion for Rehearing by St. L. & S. F. Ry. Co.

Filed June 30, 1906.

In Court of Civil Appeals, Second Supreme Judicial District.

4908.

TEXAS & PACIFIC RY. COMPANY ET AL., Appellants,
vs.
EASTIN & KNOX, Appellees.

The St. Louis and San Francisco Railroad Company, one of the appellants herein moves the court to grant it a rehearing in this cause in so far as its appeal against the Texas and Pacific Railway Company is concerned and to that end moves that the judgment of this court affirming the judgment of the court in favor of said Texas and Pacific Railway Company be set aside and held for naught and that this court enter a judgment of reversal and ordering that the judgment of the court of first instance be rendered in its favor.

250 Complaining of the judgment, decision and action of this Honorable Court in affirming the judgment of the trial court in favor of the Texas and Pacific Railway Company, movant shows

(1.)

The Court of Civil Appeals erred in not sustaining this appellant's first assignment of error found on page 7 to 9 of its brief for the reasons set forth in propositions 1 to 6 of its brief shown on pp. 9 and 10 thereof.

Because of the error complained of, this appellant moves for a rehearing to the end that the judgment of the court of first instance be set aside in so far as movant is concerned and that judgment be here entered discharging movant from any liability to said Texas and Pacific Railway Company or that its said appeal be remanded to *to* the trial court for a new trial.

It is shown that H. C. Shropshire Esq., of Weatherford, Texas, is the attorney of record for the Texas and Pacific Railway Company and that service of this motion may be had on him.

C. H. YOAKUM,
WEST, CHAPMAN & WEST,
THEODORE MACK,
Att'ys for St. L. & S. — R. R. Co., Appellant.

Endorsed: 4892/4908. In Court of Civil Appeals. T. & P. Ry. Co. *et al. v.* Eastin & Knox. Motion for a Rehearing by St. L. & S. F. R. R. Co. Filed in Supreme Court Nov. 10, 1906. F. T. Connerly, Clerk. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, Jun- 30, 1906. W. C. Strong, Clerk.

Order Overruling Motion for Rehearing by the St. L. & S. F. R. R. Co.

October 13, 1906.

251 4892, 4908.

TEXAS & PACIFIC RAILWAY CO. ET AL.
vs.
EASTIN & KNOX.

This day came on to be heard the motion by St. Louis & San Francisco Railroad Company for a rehearing in this cause and the same having been duly considered by the court is overruled.

PROCEEDINGS IN THE SUPREME COURT.

(On Second Writ of Error.)

Petition for Writ of Error by the Texas & Pacific Ry. Co.

Filed November 10, 1906.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

Petition for Writ of Error.

To the Honorable Supreme Court of Texas:

Your Petitioner, The Texas & Pacific Railway Company, respectfully represents and shows to your Honorable Court, that the Court of Civil Appeals for the Second Supreme Judicial District of Texas,

affirmed a judgment of the District Court of Parker County, Texas, in favor of Eastin & Knox, and against your petitioner, for the sum of $3500.00, for damages alleged to have been sustained by defendants in error in the shipment of a lot of cattle from Strawn, Texas, to Tulsa, I. T.

Your petitioner further says that each and all of the errors hereinafter assigned were presented to and urged upon the said Court of Civil Appeals in a motion for a rehearing filed in said court, which motion said Court overruled on the 13th. day of October, 1906.

That by reason of the errors committed by the said Court
252 of Civil Appeals in its judgment and opinion in this case to your petitioner's prejudice and injury, and in order that the said errors may be corrected, your petitioner prays your Honorable Court to grant it a writ of error to said Court of Civil Appeals.

Statement of the Nature and the Result of the Suit.

The Court will better understand the errors hereinafter assigned from the reading of the following statement of the nature and result of the suit:

This is a suit originally brought by defendants in error against plaintiff in error and its agent, J. M. Tucker, for damages growing out of the shipment of a lot of cattle from Strawn, Texas, to Tulsa, I. T. The suit was filed in the District Court of Parker County, Texas, by defendants in error on the 4th. day of February, 1904. On the first day of April, 1904, thereafter and prior to the time the plaintiff in error and its co-defendant, J. M. Tucker, were required to make answer to defendants in error's petition, this plaintiff in error joined by its agent and co-defendant, in the trial court, J. M. Tucker, filed in the District Court of Parker County, Texas, its petition and bond for removal of this case to the Circuit Court of the United States for the Northern District of Texas, together with a general denial of the allegations contained in Defendants in error's original petition. On the 5th. day of April, 1904, the same being appearance day in the District Court of Parker County, Texas, Defendants in error filed in said Court their first supplemental petition, resisting the removal of the case to said Circuit Court of the United States for the Northern District of Texas, and upon presentation and hearing of Plaintiff in error's petition and bond for removal and the supplemental petition by Defendants in error resisting the removal of this case to said Circuit Court of the United States for the Northern District of Texas, the trial Court overruled
253 said petition for the removal of the case to said Circuit Court of the United States for the Northern District of Texas, but approved said removal bond, and forced this plaintiff in error and the said J. M. Tucker to prepare for trial in the said District Court of Parker County, Texas, to which action of the Court this Plaintiff in error and the said J. M. Tucker excepted at the time and they each protested against said trial court retaining jurisdiction to further try and determine the rights of the parties in this suit. After the trial court had denied this Plaintiff in error and the said J. M.

Tucker the right to remove the case to the said Circuit Court of the United States for the Northern District of Texas, the case was continued for the term and thereafter this Plaintiff in error on the 7th day of April, 1904, filed in said State court its first amended original answer in which it still protested against the trial court retaining jurisdiction of this case and made the St. Louis and San Francisco Railroad Company a party Defendant to this case. Subsequently thereto on the 9th. day of November, 1904, this Plaintiff in error filed in said State Court its second amended original answer in which it reiterated the acts of negligence on the part of said St. Louis & San Francisco Railroad Company and prayed for relief in the alternative against said St. Louis & San Francisco Railroad Company; that is, that the liability of this Plaintiff in error be confined to the damages occur-ing on its own line and that the damages, if any, occur-ing on acount of the negligent handling of the cattle by the said St. Louis & San Francisco Railroad Company be charged to it; Or in case the damages could not be apportioned between said railway Companies then in that event this plaintiff in error have judgment over against said St. Louis & San Francisco Railroad Company in amount equal to whatever amount it might have
254 to pay, if any, on account of the negligence of the said St. Louis & San Francisco Railroad Company.

On the 9th day of November, 1904, the St. Louis & San Francisco Railroad Company answered in said trial court by general and special exceptions general denial and special pleas; and on said date this Plaintiff in error filed in said court its first supplemental answer and replication to the first amended original answer of the said St. Louis & San Francisco Railroad Company which supplemental answer contained a general exception and general denial of the matters and facts in the first amended original answer of said St. Louis and San Francisco Railroad Company.

The case went to trial upon Defendants in error's original petition, this Plaintiffs in error's second amended original and first supplemental answer; the said J. M. Tucker's original answers and the first amended original answer of the St. Louis and San Francisco Railroad Company.

For cause of action Defendants in error allege that heretofore, to-wit: 22nd day of April, 1902, this Plaintiff in error owned and operated a line of railroad extending through Palo Pinto, Parker, Tarrant, Denton, Grayson, Fannin and Lamar Counties, Texas, and that one J. M. Tucker was at said time the agent of this Plaintiff in error at the station of Strawn, Texas, and as such agent was at said time representing this Plaintiff in error in the tran-portation and shipment of freight, especially live stock. That a few days prior to the said 22nd day of April, 1902, Defendants in error notified said agent J. M. Tucker, at Strawn, Texas, that they desired to ship the cattle here in controversy from Strawn, Texas, to Tulsa, I. T., and for him to have a sufficient number of cars ready for the shipment of said cattle on said date. That Defendants in error, prior to that time, had made arrangements with the St. Louis & San Fran-
255 cisco Railroad Company to have said cattle shipped from Strawn, Texas, to Ft. Worth and thence over the line of the

Red River, Texas & Southern Railroad Company and of the St. Louis & San Francisco Railroad Company to Tulsa, I. T., which would be the shortest and most direct route from the said Strawn to the said Tulsa. That on the said 22nd day of April, 1902, Defendants in error tendered and delivered to the said Tucker for this Plaintiff in error six hundred and fifteen (615) head of stock cattle and ninety-seven (97) calves to be transported and shipped in the most expeditious manner and over the shortest and most direct route from Strawn, Texas, to Tulsa, I. T.; that the said J. M. Tucker as agent for this Plaintiff in Error, then and there agreed to accept said cattle and did accept the same for the purpose of transporting them as a common carrier for hire, from the said Strawn to the said Tulsa at the request of the Defendants in error, and agreed to transport said cattle safely from the said Strawn, to Tulsa, I. T., with reasonable diligence and speed, and as Defendants in error supposed, by the Shortest and most direct route. That on said day, after all said cattle had been about loaded on the cars, the said agents of Defendants in error, S. W. Eastin, one of the Defendants in error, was notified and requested by the said Tucker, as agent of this Plaintiff in error, to sign the bill of laden, termed, Defendants in error believed, a live stock contract, which billed or routed said cattle for shipment over the line of this Plaintiff in error to Paris, Texas, and thence over the line of the St. Louis & San Francisco Railroad Company to Monette, Mo., and from said Monett in a south-westerly course down to Tulsa, I. T., That Defendants in error objected to said cattle being billed or routed for shipment according to the provisions of said bill of lading and insisted that said cattle should be taken either to Ft. Worth, or to Sherman, and there delivered to the Red River, Texas & Southern Railroad Company, which con-
256 nects with the St. Louis & San Francisco Company at or near the north boundary line of the State of Texas, but said Agent, J. M. Tucker, flatly and absolutely refused to so bill and route said cattle for shipment over said line, and told the agent of defendant in error that said cattle would not be shipped to Tulsa in any other way than the way he had them billed, and that said cattle had to be shipped in that way or not at all. That said cattle were not in very good condition to be driven around through the country or hauled about unnecessarily for such a great length of time and handled unnecessarily as they were and that the said J. M. Tucker had notice of such facts; that had Defendants in error been aware of the fact that said cattle were to be transported by way of Paris, Texas, and Monett, Mo., they would not have permitted said cattle to be driven to Strawn for shipment on that day. That while the Agent of Defendants in error signed said bill of lading or live stock contract, he did so under compulsion and duress, and after said cattle had been received for shipment, by said agent, J. M. Tucker, for this Plaintiff in error, and protested to the signing of the same as well as to the cattle being billed, routed and shipped in that manner; and that said instrument was not signed and was not presented to Defendants in error to be signed until after Plaintiff in error had received all of said cattle in its stock pens for shipment. That this

Plaintiff in error could have either delivered said cattle to said Red River, Texas, & Southern Railway Company at Ft. Worth, Texas, or Sherman, Texas, as requested by Defendants in error and had them transported over said Railroad to Tulsa, I. T., and that Defendants in error and their agent urged and insisted that said cattle be billed and routed for shipment over said lines: that said cattle were carried by this Plaintiff in error to Paris, Texas, where they were delivered to a line of the St. Louis & San Francisco Railroad Company
257 to be from thence transported to said Tulsa; that in order to be carried from Paris, Texas, to Tulsa, I. T., said Cattle had to be transported and were transported to the town of Monette, Missouri, and from there in a south-westerly course to Tulsa, I. T.; that this route was a very indirect one and was some 289.9 miles longer than from Ft. Worth via Sherman to said Tulsa over the line of the Red River, Texas & Southern Railway Company, and the St. Louis & San Francisco Railroad Company, and 296 miles longer than from Ft. Worth over the Texas & Pacific Railway to Sherman and over the St. Louis & San Francisco Railway to Tulsa. That the most direct and shortest route for said cattle to have been shipped from Strawn to Tulsa was from Ft. Worth over the Red River, Texas & Southern Railway and the St. Louis, & San Francisco Railway to Tulsa which was only 301 miles from Ft. Worth, or thereabout. That this Plaintiff in error, or its agent, J. M. Tucker, would not transport and ship said cattle unless said bill of lading or live stock contract was signed by Defendants in error and represented to Defendants in error and their said agent that this Plaintiff in error's line did not connect with the Red River, Texas & Southern Railway Company's line at Ft. Worth and that he could not route, bill and transport said cattle to Ft. Worth and there deliver them to the said Red River, Texas & Southern Railway Company for transportation to Tulsa. That said statements were false and untrue and were made solely for the purpose of compelling Defendants in error to have their cattle shipped and routed over this Plaintiff in error's line from Strawn to Paris, Texas, in order that this Plaintiff in error might receive more of the freight charges for the transportation of the said cattle. That Defendants in error aver that the said J. M. Tucker was following some secret agreement or instructions from some of the Officials of this Plaintiff in Error regarding the shipment
258 of said cattle to the effect that all the freight which the said Tucker should receive should be so billed, routed and shipped, that as much of the transportation of said cattle to any point should be made over this Plaintiff in error's line as possible, regardless of the interest of the shippers. Defendants in error aver that when their said cattle were shipped, the said Tucker had no regard whatever for the interest of Defendants in error, but that he billed and routed said cattle with a total disregard of what expense and cost it would be to Defendants in error or the consequences that would result to said cattle by their being transported in such a long indirect and circuitous manner: that he totally and recklessly disregarded the duty that he, as the agent of this Plaintiff in error, as a common carrier, owed to Defendants in error, to receive and transport said

cattle in the most direct and practicable route and manner and in the least expensive way. That he also recklessly ignored the duty that this Plaintiff in error owed to Defendants in error, as a common carrier, in the transportation of said cattle over the lines and in the manner aforesaid; That had said cattle been transported from Stawn to Ft. Worth and there delivered to the Red River, Texas & Southern Railway Company, thence via *of* Sherman over the St. Louis & San Francisco Railroad Company, they could have been transported in about fifteen hours, or less time. That by reason of the shipment of said cattle in the manner aforesaid, said cattle had to be unloaded at Paris, Texas, and reloaded in cars belonging to the St. Louis & San Francisco Railroad Company. That the stock pens where the said cattle were unloaded were muddy and in a very bad condition and that many of the cows bogged down in mud and all were much worried, weakened, enfeebled and damaged by being bogged in said mud; That by reason of said mud the cattle would not eat or drink and in fact it was impossible for most of said cattle to reach the water and feed troughs, and in this way they were
259 compelled to do without feed and water. That one of said cows, by reason of said bogging down, was so enfeebled that she was not able to walk and had to be carried and placed in the car. That from the effects of said bogging down in the mud, the said cow died along the way, and was carried out and thrown off the car.

That when said cattle reached Catoos, the station just before Tulsa, they were detained for a period of fifteen hours, and during said delay, said cattle had to do without any food or water. That while said cattle were being delayed at said Catoos, they were side-tracked, but were not allowed to remain still, but were constantly switched backwards and forwards, in such a manner that they were jostled together until a great majority of them were knocked down on the floors of the cars and the other cattle trampled upon them. That said cattle by reason of said cars switching backwards and forwards, and said jolting and jostling, were much bruised and skinned by knocking their horns against each other, and were very much weakened; and that nearly all the strength of said cattle was lost so that when they reached Tulsa they were in a very poor, feeble and bruised condition and were scarcely able to leave the cars and stand upon their feet after they were removed therefrom. That it took sixty hours to transport said cattle from Strawn via Paris and Monette to said Tulsa, including the said delay at said Catoos. That this delay was needless and unnecessary. That it was an act of gross negligence for said cattle to be transported in the manner aforesaid; and that while they were being transported from the said Paris to the said Tulsa they were compelled to do without any food or water. That by the carrying of said cattle around in this long circuitous route and their having to be unloaded in the said muddy and boggy pens in Paris, Texas, and side tracked and delayed so long at Catoos, said cattle were so wrought upon and became so thin and feeble and weak that they could hardly stand up,
260 and many of them fell down on the floors of the cars and were trampled on by the other cattle. That they were jostled back-

wards and forwards against the cars until they became severely hurt and bruised and sore, their hair was knocked off, their body skinned, and they were covered on different parts of their bodies with bloody sores arising from the said knocks and jolts. That many of said cattle through weakness resulting from their long detention in said cars without food or water fell down in the cars and were trampled upon by the other cattle and were horned and hooked by them and were severely injured and damaged which resulted in the death of forty head of said cattle, and stating injuries sustained by the other cattle. Defendants in error further allege that there were in said lot of cattle about five hundred and fifty head of cows and that about all of said cows were with calves and that by reason of said rough treatment, nearly all of said cows, that is, to say three hundred and sixty two head, lost or dropped their calves out of season, and in a short while after they reached Tulsa. That the losing of their calves was solely from the rough treatment aforesaid and was a total loss to Defendants in error in the sum of $2,172.00. That said cows by loss of their calves were depreciated in their market value, in said Tulsa in said amount. That by reason of their treatment said cattle were depreciated in their market value to the extent of $6.00 a head. Defendants in error further plead and claim special damages in the way of feed bills, hand hire, etc., by reason of having to hold said cattle at Tulsa, on account of their condition at the time they arrived there, and prayed for damages in the sum of $8,000.00.

For answer to the petition of the Defendants in error, this Plaintiff in error, among other things, plead a general denial and specially alleged that said cattle were shipped from Strawn, Texas, to Tulsa, I. T., by and with the consent of the Defendants in error;
261 that said cattle were shipped upon written contracts in which it was provided that the liability of this Plaintiff in error should be limited to such damages, if any, as occurred upon its own line; that said cattle were safely and expeditiously carried by it from Strawn to Paris, Texas, and there delivered by it to the next connecting carrier in good condition and without loss or damage; that if said cattle were injured in the manner alleged, by Defendants in error, said injuries occurred after said cattle had passed out of the hands of this Plaintiff in error, and beyond the line of its road and not by reason of any act of negligence on its part.

Jury being waived, the case was tried before the Judge of the Trial Court where Judgment was rendered in favor of Defendants in error and against this Plaintiff in error and the said J. M. Tucker, its agent, for the sum of $3600.00, and in favor of this Plaintiff in error and against the said St. Louis & San Francisco Railroad Company for the sum of $1,800.00. From which judgment, the said J. M. Tucker, the St. Louis & San Francisco Railroad Company and this Plaintiff in error appealed.

First Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the first assignment of error of this Plaintiff in error which is as follows:

"The Court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas for the reasons set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, filed in this Court by this defendant, and its co-Defendant, J. M. Tucker, and for the reasons as is more fully shown by this Defendant's bill of exceptions No. 1."

262 *First Proposition.*

A corporation created and organized under an act of Congress, or deriving it corporate powers and existence from congressional legislation, is entitled to remove to a Federal Court any suit brought against it in a State Court, on the ground that such suit is one arising under the laws of the United States.

Statement.

Defendants in error in their original petition allege that the Texas & Pacific Railway Company is a body corporate, duly incorporated under the Federal Statutes. (Trans. p. 1.)

Plaintiff in error in its petition for removal, which petition was verified, alleged that the Texas & Pacific Railway Company was, at the time this suit was filed against it, an- now is, a corporation duly organized and existing under and by virtue of the laws of the United States, to-wit: "An act entitled an act to incorporate the Texas & Pacific Railroad Company and to aid in the construction of its road and for other purposes;" approved March 3rd, 1871, and acts amendatory thereof and supplemental thereto including an act approved May 2, 1872, whereby among other things, the name, style*d* and title of the said Texas & Pacific Railroad Company was changed to the Texas & Pacific Railway Company." That the amount in dispute in this case exceeds, exclusive of interest and costs, the sum or value of $2,000.00, and this suit arises under the laws of the United States as herein before and herein after is more fully set forth. This action against your petitioner, The Texas & Pacific Railway Company, and J. M. Tucker, its local agent at Strawn, Texas, is for damages to cattle shipped by Plaintiffs from Strawn, Texas, by them over the Texas & Pacific Railway's line, destined to Tulsa, I. T., etc. This petitioner says that Plaintiffs aver that J. M. Tucker, in shipping the cattle acted for and was the agent of the Texas & Pacific Railway Company. This pe-
263 titioner says that Plaintiffs aver that J. M. Tucker, in shipping the cattle acted for and was the agent of the Texas & Pacific Railway Company. This petitioner says that the said Tucker was its local station agent and acted for it as agent and not in any other capacity and was not and is not a proper party to this suit.

The Plaintiffs do not in their petition state any cause of action against him. They improperly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, The Texas & Pacific Railway Company from removing this case to the United States Circuit Court which said joinder of said J. M. Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this Defendant, The Texas & Pacific Railway Company, is a suit arising under the laws of the United States and more especially under the laws of the United States, constituting the charter of this Defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entitled an act to incorporate The Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes, and acts amendatory thereof and supplemental thereto, approved respectively on May 2nd, 1872, March 3rd, 1873, and June 22nd, 1874.

That the above entitled action is a civil suit, arising under the laws of the United States of which the Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by act of Congress approved March 3rd, 1887, to-wit: and act entitled an act to amend the act of Congress approved March 3rd., 1875, entitled an act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State Courts and for other purposes, and the act of Congress approved August 13th., 1888, entitled an act to correct the enrollment
264 of an act approved March 3rd., 1887, entitled, "An Act to amend sections 1, 2, 3 and 10, of an act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from the State courts and for other purposes; approved March 3rd., 1875." (Trans. pp. 14, 15 and 16).

This Plaintiff in error at the same time and place and together with its petition for removal of this case to said Circuit Court of the United States for the Northern District of Texas, filed a good and sufficient bond in accordance with the Federal Statutes, which bond was by the Court approved. (Trans. pp. 16, 17 and 18).

The Defendant, J. M. Tucker, joined this Plaintiff in error, in its petition and bond for the removal of this case to the Circuit court of the United States for the Northern District of Texas. (Trans. pp. 16, 17 and 18).

Defendants in error sued in this case to recover the total sum of $8,000.00, together with interest and costs. (Trans. p. 12).

This suit was filed in the District Court of Parker County, Texas, on the 4th. day of February, 1904, and citation issuing thereon was served upon this Plaintiff in error on the 5th. day of February 1904, which citation was returnable the first Monday in April, 1904, it being the 4th. day of April, 1904, and this Plaintiff in error was not required by the laws of the state of Texas, or the rules of the trial court to answer or plead to Defendants' in error's petition before the 5th. day of April, 1904, and this plaintiffs in error petition

and bond for the removal of this case to the Circuit Court of the United States for the Northern District of Texas was filed in the trial Court on the 1st. day of April, 1904. (Trans. pp. 1, 14, 17 and 18).

The trial court refused and overruled this Plaintiff in error'- petition and bond for removal of this case to the Circuit Court of
265 the United States for the Northern District of Texas. (Trans. p. 23.)

This Plaintiff in error in due time and manner excepted to the action of the trial court in refusing and overruling its petition and bond for the removal of this case to the circuit court of the United States for the Northern District of Texas. (Trans. p. 23).

(See bill of exception No. 1, transcript pages 23 to 29, inclusive).

Authorities.

Railway Co. *vs.* Eastin & Knox, 89 S. W. 440.
Railway Co. *vs.* Watson, 43 S. W. 1060.
Railway Co. *vs.* Davis, 55 S. W. 562.
Railway Co. *vs.* Myers, 115 U. S. 1.
Martin *vs.* Railway Co. 134 Fed. Rep. 134.
Butler *vs.* National Home, 144 U. S. 64.
Railway Co. *vs.* Cox, 145 U. S. 593.
Supreme Lodge K. of P. *vs.* Hill, 76 Fed. Rep. 468.
Allen *vs.* Railway Co. 25 Fed. Rep. 513.
Railway Co. *vs.* McComb Fed Rep. 799.
Cruikshank *vs.* Bank, 16 Fed. Rep. 888.

Second Proposition.

A suit by and against a federal Railroad corporation is a suit arising under the laws of the United States and such suit is removable.

Statement.

This Court will take judicial knowledge of the fact that the Texas & Pacific Railway Company is a Federal corporation. See statement under first proposition to first assignment of error in this application for writ of error.

Authorities.

Texas & Pacific Railway Company *vs.* Cody, 166 U. S. 609.
See authorities under first proposition first assignment of
266 error in this application for writ of error.

Third Proposition.

Circuit Courts of the United States have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the constitution or laws of the United States, and such suits are removable.

Statement.

See Statement under first proposition to first assignment of error in this application for writ of error.

Authorities.

Cummings *vs.* City of Chicago, 188 U. S. 426.
Lund. *vs.* C. R. I. & P. Ry. Co. *et al.*, 78 Fed. 385.

Fourth Proposition.

When a suit is cognizable in the court of the United States on account of the nature of the controversy it may be removed without regard to the character of the parties.

Statement.

See statement under first proposition to first assignment of error in this application for writ of error.

Authorities.

Ames *vs.* Kansas, 111 U. S. 449.
Railway Co. *vs.* California 118 U. S. 109.
Texas *vs.* Railway Co. 3 Woods (U. S.) 308.
Illinois *vs.* Railway Co. 33 Fed. Rep., 721.

Fifth Proposition.

And the right of removal is not defeated because other Defendants are joined against whom the suit may be maintained with reference to the Federal Laws.

Statement.

See Statement under first proposition to first assignment of
267 error in this application for writ of error.

Authorities.

Lund *vs.* C. R. I. & P. Ry. Co. *et al.* 78 Fed. 385.
Martin *vs.* Railway Co., 134 Fed. Rep. 134.

Sixth Proposition.

Where ground for removal is based on a Federal question and the amount in dispute exceeds $2,000.00, exclusive of interest and costs, the cause can be removed to the Federal Court, even though a party be joined in the suit as Defendant who is not effected by the Federal question, if all the Defendants join in the petition to remove.

Statement.

All the Defendants joined in the petition and bond for the removal of this case. See Statement under first proposition to first assignment of error in this application for writ of error.

See Defendants in error's petition. (Trans. pp. 1 to 12, inclusive.)

See Removal Petition and Bond. (Trans. pp. 14 to 18, inclusive.)

Authorities.

Act of Congress March 3rd, 1887, pertaining to removal of cases.
Railway Co. *vs.* Young 27 S. W. 145.
Bloom *vs.* Railway Co. 85 Texas, 285.
Martin *vs.* Railway Co. 134 Fed. Rep., 134.
Dillon on removal of causes 5th. Ed. Sec. 80, Page 95.
Black's Dillon on Removal of Causes, Sec. 127, Page 212.
Mayor *et al. vs.* Independent Steamboat Co. 24 Fed. Rep. 593.
Miller *vs.* Le Mars Nat. Bank *et al.*, 116 Fed. Rep., 551.
Martin *vs.* C. R. I. & P. Ry. Co. *et al.*, 178 U. S. 245.
Scott *vs.* Railway Co. 112 Fed. Rep. 180.

Seventh Proposition.

When a Federal question forms an ingredient in an
268 original cause, it is removable, even though other questions of fact and law may be involved in it.

Statement.

See Statement under first proposition to first assignment of error in this application for writ of error.

Authorities.

People *vs.* Sanitary Dist. of Chicago, 98 Fed. 150.
Railway Co. *vs.* State of Mississippi, 102 U. S. 135.
Omaha Horse Ry. Co. *vs.* Cable Tramway Co., 32 Fed. Rep. 729.

Eighth Proposition.

After a good and sufficient petition for the removal of a cause from the State Court, where it is pending, to the United States Circuit Court, has been filed in the former court, said State Court can enter no further order and take no further action in such cause; hence it was error for the trial court to refuse to remove this case.

Statement.

This Plaintiff in error's petition for the removal of this case was good and sufficient. See Petition set out in full. (Trans. pp. 14 to 17, inclusive.)

Plaintiff in error's bond for removal appears in the transcript, was approved by the judge of the State Court and need not be copied herein. (Trans. pp. 17 and 18.)

Authorities.

Railway Co. *vs.* Eastin & Knox, 89 S. W. 440.
25 Fed. Stat. L. 435, Sec. 3, Act March 3, 1875.
Blum *vs.* Thomas & Germany, 60 Texas, 160.
Railway Co. *vs.* Koontz, 104 U. S. 14.
Steamship Co. *vs.* Tugman, 106 U. S. 122.
Railway Co. *vs.* State of Mississippi, 102 U. S. 135.
Kanouse *vs.* Martin, 15 How. (U. S.) 198.

269 *Ninth Proposition.*

It is now settled by the United States Supreme Court that the petition for removal presents to the State Court a pure question of law, and that issues of fact thereon can be tried only in the United States Circuit Court.

Statement.

Plaintiff in error alleged in its petition for removal of this case, that the Defendant, J. M. Tucker, its local station agent, was "improperly and wrongfully joined with this petitioner in this case for the sole and only purpose of preventing this petitioner, the Texas & Pacific Railway Company, from removing this case to the United States Circuit Court, which said joinder of the said J. M. Tucker was done fraudulently for the purpose of preventing said removal, and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas." (Trans. p. 15.)

In their first supplemental petition in which they resisted the removal of this case, Defendants in error in the State Court, allege: "And specially answering said petition for removal, of the said Defendant, the said Plaintiffs come and say that they deny each, every and all of the allegations in said Defendants' petition to remove said cause to said Circuit Court as aforesaid; that it is untrue as alleged therein that these plaintiffs joined and sued the said J. M. Tucker in this cause with said T. & P. Railway Company, Defendant, wrongfully, improperly and fraudulently, and for the sole and only purpose of preventing said petitioner, The Texas & Pacific Railway Company, from removing this cause to the United States Circuit Court aforesaid; and they further deny that the joinder of said J. M. Tucker with the said T. & P. Railway Co., as a co-Defendant, was done fraudulently, and was and is a fraud on the jurisdiction of

said the Circuit Court of the United States for the Northern
270 District of Texas," etc. (Trans. p. 20.) This pleading was verified by oath. (Trans. p. 22.) Defendants in Error do not by special execution or otherwise question the sufficiency of the allegations of fraud in Plaintiffs in error's petition for Removal.

Authorities.

Railway Co. *vs.* Daugherty, 138 U. S. 303.
Crehore *vs.* Railway Co. 131 U. S. 240.
Railway Co. *vs.* Dunn, 122 U. S. 513.
Stone *vs.* State South Carolina, 117 U. S. 430.

Tenth Proposition.

A state Court can not inquire into and decide issues of fact made upon the petition for removal, and where the petition for removal makes a *prima facie* case in its averments of fraudulent joinder, the State court is thereupon deprived of jurisdiction; hence it was error for the State Court to refuse to remove this case to the Circuit Court of the United States for the Northern District of Texas.

Statement.

See Statement under ninth proposition to first assignment of errors in this application for writ of error. See Statement under eighth proposition to first assignment of error in this application for writ of error. Defendants in error do not except to the allegations of fraud in Plaintiff in Error's petition for removal and in absence of Exceptions thereto said allegations are sufficient.

Authorities.

Railway Co. *vs.* Eastin & Knox, 89 S. W. 440.
Arrowsmith *vs.* Railway Co., 57 Fed. Rep. 170.
See authorities under ninth proposition to first assignment of error in this application for writ of error.

Eleventh Proposition.

271 Where there is no separable controversy as between the Plaintiff and the removing Defendant, but the ground of removal is, that the cause of action arises under the constitution or laws of the United States, the suit can be removed only on the petition of all the Defendants.

Statement.

See Statement under first proposition to first assignment of error in this application for writ of error.

Authorities.

Martin *vs.* Railway Co. 134 Fed. Rep. 134.
Railway Co. *vs.* Martin, 178 U. S. 245.
Lund *vs.* Railway Co., 78 Fed. Rep. 385.

Second Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the second assignment of error of this Plaintiff in error which is as follows:

"The judgment is contrary to law and unsupported by the evidence in this: It appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22nd., 1902, and that by the terms of said written contracts, the liability of this defendant, if any, was limited to such injuries and damage as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this Defendant's own line of railroad; that by the terms of said contracts, this Defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this Defendant was not to be held or deemed liable for any loss or damage sustained by Plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this Defendant received said cattle at Strawn,
272 Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier, without loss or damage to Plaintiffs and that this Defendant did protect the through rate of freight named in said contracts; that this Defendants' line of railway did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this Defendant's line of railroad, or any line of railroad owned and operated by this Defendant, after they were delivered by this Defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this Defendant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control of this Defendant; that all the injury, loss and damage sustained by Plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers, from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of Plaintiffs, and that Plaintiffs executed and signed the contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this Defendant was not authorized and did not have any authority to ship said cattle upon through billing and upon a through freight rate

from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have
273 accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this Defendant for shipment at Strawn, Texas, this Defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate, whereupon Plaintiffs requested and directed that said cattle be shipped via Paris, Texas.

First Proposition.

Where cattle are transported from one State into another, over two or more lines of railroad, upon contracts limiting the liability of the initial carrier for such loss and damage, only, as occurs while the cattle are in its possession and being carried by it over its own line of railroad, such initial carrier is not liable to the shipper for any loss or damage to said cattle, arising by reason of the negligent handling of the cattle by any one or more of said connecting carriers.

Statement.

The cattle in controversy were shipped upon two live stock contracts dated Strawn, Texas, April 22nd, 1902, by the Terms of which it was provided that the liability of Plaintiff in error was limited to such loss and damage only as occurred while the cattle were in its possession and being carried by it over its own line of railroad. See contracts. (Trans. pp. 101 to 112, inclusive.)

The witness, Frank Chase, who accompanied the cattle said: "The cattle were carried from Strawn to Paris in good time and arrived there in good condition. I had no complaint whatever to make as to
that part of the run: they were delivered to the Frisco at
274 Paris in good shape." (Transcript p. 76.)

The witness Chase further says "immediately upon arrival at Paris, the cattle were placed on the connecting track between the T. & P. and the Frisco and it was only a short time until they were taken to the pens and unloaded; the men in charge of the Frisco pens unloaded the cattle. I think it was the Frisco that took the cattle off the connecting track and carried them to the pens; the cattle remained in the pens for three or four hours; the men who had charge of the Frisco pens fed the cattle; the reloading gang of the Frisco loaded the cattle back into the cars at Paris; A Frisco train carried the cattle out of Paris; I think the first time the conductors were changed after leaving Paris was at Monette, Missouri." (Trans. p. 74.)

All the injury loss and damage sustained by Plaintiffs in the shipment of said cattle occurred while said cattle were in possession

of and were being carried by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination. The witness Chase further says, "We had no kick whatever to make as to the handling of the train or the time made over the Frisco except from Vinita, to Catoosa; we did not stop at Vinita more than thirty minutes; the train was not switched there at all; I do not believe the train was switched at any point between Vinita and Catoosa; it is fifty miles from Vinita to Catoosa; we left Vinita about four o'clock and got to Catoosa about night or a little after night; I do not remember exact*ing* how long it took to make the run; we remained at Catoosa until daylight, or a little after daylight, the next morning because it was eight o'clock when we got to Tulsa, a distance of only 16 miles; they see-sawed the cars in which the cattle were in and out all night long at Catoosa; sometimes they would shake the cattle up pretty smartly and another time it would not be quite so bad; the treatment the cattle received at Catoosa, of course, hurt them worse than any other part of the trip because every time, they, as I term it, changed ends with the engine, they knocked more or less of them down, and they were bruised and skinned and crippled pretty badly; we had a fairly good run from the time we left Strawn until we got to Catoosa; we had no complaint at all to make until we reached Catoosa; as far as the handling of the train, etc. is concerned, Catoosa is the only place at which they were choused around to amount to anything, or received any rough handling or rough treatment; the cattle were carried from Strawn to Paris in good time and arrived there in good condition; I had no complaint whatever to make as to that part of the run; they were delivered to the Frisco at Paris in good shape. (Trans. pp. 75 and 76.) The switching back and forth and jolting around at Catoosa knocked the cattle down and choused them around until it was utterly impossible for us to keep them up; they were bruised up pretty badly; we worked on them just as long and just as often (Trans. p. 68.) as we could get to them, getting them up; it knocked off their hair and skin; I think there were about fifteen head down when we got to Tulsa, and I think we got them all up and they all walked out of the car, except seven or eight head which we had to drag out; I do not think any of them were dead, but seven or eight of them were helpless and could not get up, and could not stand after we helped them up." (Trans. p. 69.) If those cattle had not been delayed and roughly handled at Catoosa they would not have been damaged as badly as they were; they would probably have been damaged but very little. (Trans. p. 82.)

Authorities.

Railway Co. *vs.* Baird, 75 Texas, 256.
McCarn *vs.* Railway Co., 84 Texas 352.
Railway Co., *vs.* Adams, 78 Texas, 372.
Hunter *vs.* Railway Co., 76 Texas, 195.
Railway Co., *vs.* Williams, 77 Texas, 121.

Railway Co. *vs.* Thornton, 22 S. W. 67.
Railway Co. *vs.* Hawkins, 30 S. W. 1113.
Railway Co. *vs.* Crossman, 33 S. W. 290.
Rogers *vs.* Railway Co. 28 S. W., 1024.

Second Proposition.

A carrier which makes a through shipment under a special contract for a reduced rate of freight is not liable for an injury to the shipment on a connecting line, though it did not choose the through route, which the shipper preferred.

Statement.

The through rate specified in the contracts, upon which the cattle in controversy were shipped, was $57.50 per car. The local rate from Strawn to Tulsa was $58.40. See testimony of the witness Brashier. (Trans. 117.) See contracts. (Trans. pp. 101 and 107.)

Authorities.

Railway Co. *vs.* Short, 25 S. W. 142.

Third Proposition.

Where cattle are tendered for shipment to a point beyond the initial carrier's line, such carrier cannot be compelled to accept the cattle to be carried over one route in preference to another, at the shipper's option.

Statement.

See statement under first propostion of second assignment of error in this application for writ of error.

Authorities.

Blessing *vs.* Railway Co. 80 S. W. 641.
Railway Co. *vs.* Railway Company, 110 U. S. 680.
277 Railway Co. *vs.* Miami S. S. Co., 86 Fed. Rep. 416.
Railway Co. *vs.* Railway Co. 41 Fed. Rep. 563.
St. Louis Drayage Co. *vs.* Railway Co. 65, Fed. Rep. 41.
Railway Co. *vs.* Railway Co. 50 Fed. Rep. 400.
K. & I. Bridge Co. *vs.* Railway Co. 37 Fed. Rep. 567.
Post *vs.* Railway Co. 52 S. W. 306.

Fourth Proposition.

This Plaintiff in error, having carried and transported the cattle from Strawn, Texas, to Paris, Texas, and delivered the cattle at the latter place to the next connecting carrier without loss or damage, it was not liable for any injury the cattle received under the

facts in this case, while being transported from Paris, Texas, to Tulsa, I. T. by the connecting carriers.

Statement.

The statement under first proposition to second assignment of error in this application for writ of error.

Authorities.

None are necessary.

Fifth Proposition.

Defendants in error having agreed and consented to the routing of the cattle via Paris, Texas, cannot be heard to complain of such action on the part of this Plaintiff in error.

Statement.

The witness Chase says, "I did not object to signing the contract. I do not think I said a word about it." (Trans. p. 80.)

The witness, S. W. Eastin, one of the Defendants in error, says, "I did not object to signing these contracts. (Trans. p. 86.)

Witness J. M. Tucker, one of the Defendants, testified: "I remember the shipment of cattle in controversy; somewhere
278 about five or six o'clock in the evening, after most of the cattle were loaded, there came up a controversy about the routing of the cattle; Mr. Eastin insisted that I should route the cattle via Ft. Worth and (Trans. p. 87) the Frisco; I told him I had no authority whatever to route the cattle via Ft. Worth and the Frisco; I then told him I could route the cattle via *of* Paris or Sherman; he studied about it for a half minute or so, and said, "All right, let them go via Paris;" (Trans. p. 88).

The witness Edmonson testified: I was present at the time of the making of the contract for the shipment of the cattle in controversy. I think I was present at the time the contracts were signed by Mr. Eastin and I saw him sign them; he did not object to signing them. I saw Mr. Eastin sign these contracts; I heard him talking about shipping the cattle; he at first objected to the cattle going around by Paris, but afterwards agreed to let them go that way; (Trans., p. 97).

Authorities.

None are necessary.

Sixth Proposition.

This plaintiff in error, being without authority to bill and ship the cattle in controversy upon through billing and a through freight rate, via Red River, Texas & Southern Railroad from Ft. Worth Texas, cannot be held liable in damages by reason of its failure or refusal to so route and ship the cattle.

Statement.

The witness, J. M. Tucker, testified; "When I got to the office in order to satisfy myself, I called up the chief dispatcher at Ft. Worth and asked him if he knew of any arrangement by which these cattle could be routed via Ft. Worth and the Frisco, and he said he
279 did not; I then told Mr. Eastin that having no authority, whatever to bill the cattle via Ft. Worth and Frisco, I could not do it. (Trans. p. 88.)

The witness, Baird, testified: "On April 22nd, 1902 we had through billing by either Sherman or Paris on shipments going from Strawn, Texas, to the St. Louis & San Francisco Railroad Company; the St. Louis & San Francisco Railroad Company had joined with the Texas & Pacific Railway Company in making that routing; At that time the agent at Strawn did not have authority to route cattle any other way than by Sherman or Paris. I have (Trans. p. 94) here the instructions to agent and connections which shows that such shipments were to be routed by either Paris or Sherman; it is on page 22 of this circular; this is the routing and instructions that were agreed to by the St. Louis & San Francisco Railroad Company: It is called circular A-90 Billings Instructions, issued by R. Fenby, Auditor of the Texas & Pacific Railway Company; at the time the shipment in controversy was made, the agent at Strawn had no authority to give through billing or through rates over the Frisco from Ft. Worth on." (Trans. p. 95.)

See also part of page 22 of the Circular A-90 introduced in evidence. Trans. p. 101.)

The witness H. C. Brashier, a witness for the St. Louis & San Francisco Railroad Company testified as follows: I am chief clerk in the freight office of the St. Louis & San Francisco Railroad Company in Texas, and the Ft. Worth and Rio Grande Railroad Company. (Trans. p. 112.) If these cattle had been presented to us at Ft. Worth on the 23rd of April, 1902, we probably would have accepted them, but not on through rate at that point; we would not have accepted them on through rate, because we had no ar-
280 rangements for any divisions of the revenue with the T. & P. * * * Prior to April 22nd, 1902, the Red River, Texas & Southern received cattle shipments at Ft. Worth from some lines; it received shipments at Ft. Worth from the Rio Grande, from the Santa Fe, some from the Denver and some from the Rock Island; at that time an agreement had been made with those roads as to the division of the revenue, but had not been (Trans. p. 114) made with the T. & P. Railway Company; and agreement was not made with the T. & P. until May 1st, 1902, by which the Red River, Texas & Southern would receive cattle from it at Ft. Worth; that was some five or six days after the shipment in question." (Trans. p .115.) If these cattle had been billed to our company at Ft. Worth, we no doubt would have turned them down at that point unless they had been billed to us on the local rate, and we would then have assessed the local rate from Ft. Worth to Tulsa. (Trans. p. 117.) The T.

& P. Railway Company received $19.84 per car for carrying the shipment to Paris if they had delivered it to the Frisco at Sherman, they would have received $25.07 per car. (Trans. p. 118.)

Authorities.

None are necessary, but see Railway Co. *vs.* Everett, 89 S. W. 761.

Seventh Proposition.

All the injury, loss and damage sustained by Plaintiffs in the shipment and transportation of said cattle having occurred while said cattle were in the possession and under the control of, and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., it was the duty of the trial Court to render judgment for this Plaintiff in error.

Statement.

See statement under first Proposition to second assignment of error in this application for writ of error.

281 *Authorities.*

None are necessary.

Eighth Proposition.

Defendants in error having executed and signed the contracts upon which the cattle were shipped without objection or protest, cannot now question the validity of said contracts.

Statement.

See statement under fifth proposition to second assignment of error in this application for writ of error.

Authorities.

None are necessary.

Ninth Proposition.

A Railway Company cannot be made to pay damages because of its failure or refusal to bill and ship cattle, upon through billing and a through freight rate, over the line of a connecting carrier with whom it has no agreement or arrangement for the handling and transportation of said cattle.

Statement.

See statement under sixth proposition to second assignment of error in this application for writ of error.

Authorities.

This is elementary.

Third Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the third assignment of error of this Plaintiff in error which is as follows:

"The judgment is contrary to law and unsupported by the evidence in this; there is no legal or sufficient evidence before the Court, showing the market value of their cattle in controversy at Tulsa, I. T., at the time of their arrival there, in the condition in which
282 they were delivered at Tulsa, I. T., and there is no legal or sufficient evidence before the Court, showing the market value of such cattle at Tulsa, I. T., at the time of their arrival there, had the cattle been delivered at Tulsa, I. T., with due care and in proper condition; there is no legal or sufficient evidence before the Court, showing the difference between the market value of the cattle at Tulsa, I. T., at the time of their arrival there, in the condition in which they did arrive there, and the market value of said cattle at Tulsa, I. T., at the time of their arrival there had they been delivered there at said time in due time, and in proper condition; wherefore this Defendant says the judgment is excessive.

First Proposition.

Defendants in error, having failed to prove and establish the market value of the cattle at Tulsa, I. T., the point of destination, by legal and sufficient evidence, it was the duty of the trial court to render judgment for this Plaintiff in error.

Statement.

The witness Chase, for Defendants in error testified: "I have been in the cattle business for fifteen years or longer; I remained at Tulsa for about six weeks after these cattle were shipped there; I had also been there previous to that time, and have been there since; I had been at Catoosa, which is just a short distance from Tulsa, about a year previous to that time with a big lot of cattle, I have not stopped off at Tulsa since the shipment in question; I have passed through there, however and have been in that vicinity; I have been staying down this side of Tulsa this year; I have been there five months; I was there with cattle; if the cattle in question had reached Tulsa in the condition in which they should have reached there, and had been treated right they would have been worth at least $20, a
283 head; they were worth at least five or six dollars a head less on account of the condition in which they did arrive at (Trans. p. 70.) *at* Tulsa than they would have been worth had they arrived there in proper order." (Trans. p. 71.)

On Cross examination the same witness testified: "I did not buy any cattle after I arrived at Tulsa and did not sell any except the calves; I did not see any cattle sold while I was at Tulsa; I based my

opinion as to the market value of these cattle on what such cattle were bringing on the markets; I do not know what the market value of these cattle were at Tulsa. (Trans. p. 77.)

The witness, S. W. Eastin, one of the defendants in Error on direct examination testified: "Mr. Chase was in charge of this shipment; I do not know what time in May I went to Tulsa; I remained there from May until about December; from my knowledge of those cattle, and knowledge of the market for stock cattle at Tulsa when I arrived there, I think these cattle would have brought $20. per head had they arrived at Tulsa in the condition they should have arrived; I have been in the cattle business, off and on, for many years; I have handled a good many cattle in the Territory, near Tulsa, and think I was well acquainted with the market value of stock cattle, such as these, up there in that season. (Trans. p. 85.)

On Cross Examination the same witness testified: "I think the first trip I made to Tulsa was in May subsequent to this shipment; I did not go with this shipment; I do not know anything about what the market value of the cattle was at Tulsa on April 23rd, except from the fact that I was there in May following; (Trans. p. 85).

Plaintiff in error at the time excepted to the testimony of the witness Chase, as to the market value of the cattle at Tulsa at the time of the arrival of the cattle there. See bill of Exception No. 2. (Trans. pp. 129 and 130.)

284 This Plaintiff in error excepted at the time to the testimony of the witness Eastin as to the market value of the cattle at Tulsa at the time of their arrival there. See Bill of Exception No. 3. (Trans. pp. 130 and 131.)

The above is all the testimony as to the market value of the cattle at the time of their arrival at Tulsa in April introduced by Defendants in error on the trial of this case.

This Plaintiff in error's motion for a new trial was by the Court overruled. (Trans. p. 154)

Authorities.

None ar- necessary.

Second Proposition.

In a suit against a railway Company for damages growing out of the shipment of cattle, the shipper, or owner, before he can recover, must prove the market value of the cattle at the point of destination by legal and sufficient evidence; and when the evidence fails to show the market value of the cattle at the point of destination at the time of their arrival there, it is the duty of the trial Court, (The case being tried before the Court) to set the judgment of the Court aside and grant the Defendants a new trial.

Statement.

See statement under first proposition to third assignment of error in this application for writ of error.

Authorities.

This is elementary.

Fourth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the fourth assignment of error of this Plaintiff in error, which is as follows:"

"The judgment is contrary to law and unsupported by the evidence in this: the judgment is excessive in this: it appears
285 from the evidence that said cattle would naturally and necessarily have sustained some damage in the shipping and transportation of them from Strawn, Texas, to Tulsa, I. T. regardless of how they were handled upon the train and elsewh-re during transportation; that only twenty-nine head of said cattle were killed or died from injuries received while being carried and transported from Strawn, Texas, to Tulsa, I. T., and that the balance of the grown cattle, being some 585 head, were damaged to the extent of about five to six dollars per head; that of this number some five hundred and fifty head were cows, about all of which were with calves, and that a great number of said cows lost their calves by reason of the treatment they received during the time they were being carried and transported upon the cars; that the greater part of the damage and injury sustained by the cows which lost their calves was caused by reason of their having lost their calves; that at the time said cows were tendered to an received by this Defendant for shipment, and at the time said cattle were loaded upon Defendant's cars and shipped by this Defendant, and at the time and execution and making of the contracts upon which said cattle were shipped, this Defendant did not know and was not informed that any of said cows were with calves and there was nothing in the appearance of said cows, which indicated to this Defendant or its agent, J. M. Tucker, that such cows were with calves. That plaintiffs do not plead or allege that this Defendant was informed or knew that any of said cows were with calves or that there was anything in the appearance of said cows that indicated that any of said cows were with calves.

First Proposition.

This Plaintiff in error was not liable for injuries to any of said cows while being transported from Strawn, Texas, to Tulsa,
286 I. T., resulting from their being with calves, unless it had notice at the time it received and shipped said cows that said cows were with calves, or of facts sufficient to charge it with knowledge of their condition; hence the judgment of the trial Court is excessive.

Statement.

Defendants in error do not plead and allege in their petition that this plaintiff in error did have notice, at the time it received and shipped said cows, of the fact that any of said cows were with calves, or that this Plaintiff in error, at said time, was in possession of facts sufficient to charge it with knowledge of the condition of said cows.

This can not be shown otherwise than by reference to the entire petition of Defendants in error. (Trans. pp. 1 to 12, inclusive.)

The witness J. M. Tucker, testified: "I was not informed by the Plaintiffs at that time that any of the cows were with calf; I do not know and was not informed in any way that the cows were in that condition. (Trans. p. 89)

The witness, Chase, for Defendants in error, testified: "They were worth at least five or six dollars per head less on account of the condition in which they did arrive at (Trans. p. 70.) Tulsa than they would have been worth, had they arrived there in proper order; there was a big loss in the calf crop, which is one way of determining what the actual damage was (Trans. p. 71). I remained with these cattle for six weeks after they were unloaded, during which time lots of the cows were losing their calves; I found dead calves, pretty nearly every day up to the time I left there, but did not keep any account of them." (Trans. p. 71.) The shipping of cows with calf has a tendency to cause them to drop their calves in the manner that I have testified about; in all probability these cows would have dropped their calves in that manner, irrespective of the route they
287 were shipped over, that is, some of them; such a result occasionally grows out of the driving and moving of cattle any distance, so that they become fatigued. (Trans. p. 78.)

Plaintiff in error's motion for new trial, was by the Court overruled. (Trans. p. 154.)

Authorities.

Railway Co. *vs.* Fagan, 27 S. W. 887.

Second Proposition.

It appearing from the evidence that the cattle would necessarily have sustained some damage in the shipment, regardless of how they were handled, and the evidence failing to show the extent of such natural and necessary damage; and that only twenty-nine head of the cattle died from the injuries they received; and that the balance of the grown cattle, some 585 head, were damaged only about five or six dollars per head; and that the greater part of the damage sustained by the cows which lost their calves, was caused by reason of their having lost their calves, under the facts in this case, the judgment is clearly excessive, and it was the duty of the trial court to set the judgment aside and grant this Plaintiff in error a new trial.

Statement.

The witness Chase, for Defendants in error, testified: "There would naturally have been some shrinkage and damage to them, but I can not tell what it (Trans. p. 77) would have amounted to; if the cattle had been shipped by the short route I could have come nearer telling what the natural damage would have been; the shipping of cows with calf has a tendency to cause them to drop their calves in the manner that I have testified about: in all probability these

cows would have dropped their calves in that manner, irrespective of the route they were shipped over. (Trans. p. 78.)

288 In its finding of facts the Court found: "That thereby 39 head of the cattle were killed; that the cattle killed were of the value of $20. per head, and the balance of the grown cattle were damaged five dollars per head, and this, with items of reasonable and necessary expense that Plaintiffs incurred as charged in their petition, they were damaged in said sum of $3600.00. (Trans. p. 125.)

See Statement under first proposition fourth assignment of error in this application for writ of error.

Authorities.

None are necessary.

Fifth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the fifth assignment of error of this Plaintiff in error which is as follows:

"The Court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the twenty-nine head of said cattle were of the value of $20.00 per head, and that the balance of the grown cattle were damaged $5.00 per head, and that Plaintiffs were damaged in the sum of $3,600.00.

First Proposition.

A finding of fact unsupported by the evidence is erroneous.

Statement.

The Court found, "That thereby twenty-nine head of the cattle were killed that the cattle killed were of the value of $20.00 per head, and the balance of the grown cattle were damaged $5.00 per head, and this, with items of reasonable and necessary expenses that Plaintiffs incurred as charged in their petition, they were damaged in said sum of $3,600.00. (Trans. p. 125.)

289 See statement under first proposition to third assignment of error in this application for writ of error.

See statement under first proposition to fourth assignment of error in this application for writ of error.

See statement under second proposition to fourth assignment of error in this application for writ of error.

Authorities.

None are necessary.

Sixth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the Sixth assignment of error of this Plaintiff in error which is as fol-

lows: "The Court erred in the second paragraph of its finding of fact in finding as a matter of fact, that the balance of the grown cattle were damaged $5.00 per head."

First Proposition.

A finding of fact unsupported by the evidence is erroneous.

Statement.

See statement under first proposition to fifth assignment of error in this application for writ of error.

Authorities.

None are necessary.

Seventh Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the seventh assignment of error of this Plaintiff in error which is as follows: "The Court erred in the second paragraph of its finding of fact, wherein it found as a matter of fact, that on or about the 18th day of April, 1902, Plaintiffs applied to the Defendant, J. M. Tucker, agent of the Texas & Pacific Railway Company, at Strawn, Texas, for eighteen stock cars, to be furnished at Strawn on
290 the 22nd of April, 1902, for the purpose of shipping eighteen cars of cattle from said station of Strawn on Defendants' line of railroad to Tulsa, a station on the St. Louis & San Francisco Railroad in the Indian Territory. That the Plaintiffs at the time of ordering said cars informed the Defendant Tucker, as agent of the Texas & Pacific Railway Company, that they wished to ship their cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. That said Tucker, as such agent agreed to and did furnish said cars at Strawn on the 22nd of April, 1902; because first: Plaintiffs do not plead and allege in their petition that they did so inform the Defendant Tucker, as agent of this Defendant, at the time they ordered said cars that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company; Second: It appears from the evidence that the Defendant Tucker, as Agent of this Defendant, did not agree to, and did not furnish said cars on the 22nd day of April, 1902, for the purpose of shipping said cattle over the line of this Defendant's road from Strawn, Texas, to Ft. Worth, Texas, and from there on over the line of the St. Louis & San Francisco Railroad Company to Tulsa, I. T.

First Proposition.

The finding of the court upon an issue not made by the pleadings and supported by the evidence is erroneous.

Statement.

Defendants in error do not plead and allege that they did so inform the Defendant Tucker, as agent of this Defendant, at the time they ordered said cars that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the Texas & Pacific Rail-
291 road and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. This cannot be shown otherwise by reference to the entire pleading of Defendants in error. (Trans. pp. 1 to 12, inclusive.)

Authorities.

None are necessary.

Second Proposition.

Facts not alleged cannot form the basis of the judgment.

Statement.

See Statement under first proposition to seventh assignment of error in this application for writ of error.

Authorities.

None are necessary.

Eighth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the eighth assignment of error of this Plaintiff in error which is as follows:

"The Court erred in the second paragraph of its findings of fact wherein the Court found as a fact that late in the evening of the 22nd day of April, 1902, and after most of the cattle were loaded, the Agent of the Defendant, The Texas & Pacific Railway Company, the said J. M. Tucker, one of the Defendants herein, presented to S. W. Eastin, one of the Plaintiffs, the live stock contracts attached to the second amended original answer of the defendant, Texas & Pacific Railway Company, for his signature, which contracts were for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over the Texas & Pacific Railroad to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa; that when said Eastin was informed that his cattle were routed by Paris,
292 he objected, and stated that the route was much further than via of Ft. Worth, and from there over the St. Louis & San Francisco railroad, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco Railroad to Tulsa, I. T. Said agent Tucker then and there informed the plaintiff Eastin, that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to

route said cattle through from Strawn to Tulsa, I. T., over any other route except by its own line to Paris, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the purpose of getting his cattle shipped, signed said contracts attached to said second amended original answer of the defendant, Texas & Pacific Railway Company; he did this unwillingly, because he thought that was the only means by which he could get his cattle shipped through from Strawn, Texas, to Tulsa, I. T., on a through bill of lading. That the plaintiffs had no place to put the cattle if they were not shipped through to Tulsa, I. T., near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only means by which he could get his cattle shipped through to Tulsa; because, 1st: It appears from the evidence that at the time said contracts were presented to the plaintiff Eastin but little more than half of said cattle were loaded on the cars; 2nd: It appears from the evidence that said contracts only stipulated and provided for the transportation of said cattle from Strawn, Texas, over the road of this defendant to Paris, Texas, and did not stipulate and provide for the transportation of said cattle from there on over the St. Louis & San Francisco road to Tulsa, I. T.; 3rd:
293 It appears *It appears* from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest; 4th: It appears from the evidence that at said time the said J. M. Tucker, agent of this defendant, offered to route said cattle through via Sherman, Texas, or via Paris, Texas, and that said cattle were routed via Paris, Texas, under the direction and at the request and with the consent of Plaintiffs."

First Proposition.

A finding of the court not supported by the evidence is erroneous.

Statement.

The contracts upon which the cattle were shipped only obligated The Texas & Pacific Company to carry the cattle from Strawn, Texas, to Paris, Texas. See contracts. (Trans. pp. 101 to 112.)

See statement under fifth proposition to second assignment of error in this application for writ of error.

Agent J. M. Tucker offered to route the cattle through via Sherman. (Trans. p. 88.)

Authorities.

None are necessary.

Ninth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the ninth assignment of error of this plaintiff in error which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact that this defendant 'could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road;' because, first: It appears from the evidence that at the time of the shipment of said cattle this defendant did not have any arrangement or agreement with the said St. Louis
294 & San Francisco road for the shipment and transportation of said cattle upon through billing and a through freight rate via St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant did not have any authority and was not authorized to route said cattle upon through billing and a through rate over the line of road of the said St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., 2nd: It appears from the evidence that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried and transported the same over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate."

First Proposition.

A finding of the court not supported by the evidence is erroneous

Statement.

There is not a single word of testimony in the record of this case showing or tending to show that this plaintiff in error could have routed said cattle through from Strawn to Tulsa by way of Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road.

See statement under sixth proposition to second assignment of error in this aplication for writ of error. Motion for new trial overruled. (Trans. p. 154.)

Authorities.

None are necessary.

Tenth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the tenth assignment of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its findings
295 of fact wherein the court found as a fact 'that the plaintiffs at the time of said shipment did not know that they could have their cattle shipped over the Texas & Pacific Railway to Sherman, and from there over the St. Louis & San Francisco Railroad; that the route via Sherman was as short as the one by Ft. Worth, and would have suited them, the plaintiffs, as well as the way by Ft. Worth;' because, 1st: It appears from the evidence that at the time said cattle were received and shipped by this defendant, plain-

tiffs were told and informed by this defendant's agent, J. M. Tucker, that this defendant could and would bill and ship said cattle upon a through freight rate via Sherman, Texas; 2nd: there is no evidence before the court showing or tending to show that the route via Sherman would have suited Plaintiffs as well as the way by Ft. Worth, Texas."

First Proposition.

A finding of the court unsupported by the evidence cannot be made the basis of a judgment, and is erroneous.

Statement.

There is not a word of testimony in the record of this case showing that the route via Sherman would have suited Plaintiffs as well as the way by Ft. Worth. This cannot be shown otherwise than by reference to the testimony of the different witnesses.

The witness Tucker says: "I then told him I could route the cattle via Paris or Sherman; he studied about it for a half minute or so, and said, all-right, let them go by way of Paris. (Trans. p. 88.)

Authorities.

None are necessary.

Eleventh Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the eleventh assignment of error of this plaintiff in error, which
296 is as follows:

"The court erred in the second paragraph of its findings of fact, wherein the Court found as a fact 'that said shipping contracts were signed by the plaintiffs Eastin by reason of duress, and for that reason, not binding on plaintiffs; because, it appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest."

First Proposition.

Where, at the time of a parol contract between a shipper of live stock and the carrier, the shipper expects to sign a written contract, and he subsequently does so, he is not in a position to avoid the force of provisions in the written contract limiting the liability of the carrier to damages occurring on its own line.

Statement.

The witness Chase, for defendants in error, testified: "I have been shipping off and on for fifteen years over different railroads: previous to this time I had shipped some cattle over the T. & P., the Frisco and quite a good many others; I do not think I had (Trans. p. 71) shipped cattle over the T. & P. previous to this time

but once; I had also shipped over the Texas Midland, the Santa Fe and Iron Mountain; in making shipments of cattle I would just order the cars and route the cattle the way I wanted them to go; I did not always sign shipping contracts as I did in this instance, as this time I was shipping the cattle for Eastin & Knox, and at other times I was shipping for myself; at such times I signed the contracts as owner and shipper also; every time I shipped cattle there was a contract made and signed, just as there was in this case; from my experience I knew I would have to sign such contract, that the Railway Company always required it to be done." (Trans. p. 72,)

297 "There was nothing said at that time about any rate; I knew at that time that when we came to ship the cattle we would have to sign up contracts." (Trans. p. 82.)

S. W. Eastin, one of the defendants in error, testified: "I have been in the cattle business off and on a long time; I do not know how often I have shipped cattle prior to the time of this shipment, but I have shipped a great many beef and stock cattle; I do not recollect what roads I have shipped over, but I have shipped over a number; I do not know how many times I have shipped over the T. & P.; I used to ship a good many cattle from East Texas, but do not recollect what roads they went over; I do not recollect whether or not I have made several shipments over the T. & P.; in shipping cattle I always had to sign contracts as I did in this instance; I always knew that I would have to sign a contract; when we brought these cattle down to Strawn for the purpose of shipping them, I expected to have to sign contracts as usual." (Trans. p. 85.)

Plaintiff in error's motion for new trial was overruled. (Trans. p. 154.)

Authorities.

Railway Co. *vs.* Halsell, 81 S. W. 1243.
Railway Co. *vs.* Wright, 58 S. W. 847.
Railway Co. *vs.* Byers, 73 S. W. 427.
Railway Co. — Gallagher, 70 S. W. 97.

Second Proposition.

Duress to invalidate a contract must destroy the voluntary character of the transaction.

Statement.

Defendant in error Eastin and his agent Chase executed and signed the contracts upon which the cattle were shipped willingly and without objection and protest. See statement under fifth proposition to second assignment of error in this application for

298 writ of error.

See statement under first proposition to eleventh assignment of error in this application for writ of error.

Authorities.

Anderson *vs.* Anderson, 100 N. W. 829.
Zuccarello *vs.* Randolph, 58 S. W. 453.
Palmer *vs.* Bosley, 62 S. W. 195.
Bausch *vs.* Crane, 19 S. W. 63.
Morgan *vs.* Joy, 26 S. W. 670.

Third Proposition.

Where it is sought to avoid a contract because induced by duress, the person seeking such avoidance will be held to have elected to waive the duress and ratify the contract, where he recognizes the validity of the contract, either by making payment thereon or otherwise.

Statement.

Defendants in error recognized the validity of the contracts upon which the cattle were shipped by executing and signing the same without objection or protest, and in paying the rate of freight named therein.

See statement under first proposition to second assignment of error in this application for writ of error.

Authorities.

Carver *vs.* United States, 111 U. S. 609.
Gregor *vs.* Hyde, 62 Fed. Rep. 107.
A. & E. Ency. Law, 2nd Ed. Vol. 10, 337.

Twelfth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the twelfth assignment of error of this plaintiff in error, which is as follows:

299 "The court erred in the second paragraph of its findings of fact wherein the court found as a matter of fact that the said Tucker refused to route the said cattle through from Strawn, to Tulsa, I. T., over any other route except by this defendant's own line to Paris, and from there on over the St. Louis & San Francisco road, to Tulsa, I. T.'; because it appears from the evidence that the said Tucker offered to route said cattle through from Strawn to Tulsa, I. T., over this defendant's own line to Sherman, Texas."

First Proposition.

A finding of the court unsupported by the evidence is erroneous.

Statement.

See statement under first proposition under tenth assignment of error in this application for writ of error.

Authorities.

None are necessary.

Thirteenth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the thirteenth assignment of error *in* this Plaintiff in error which is as follows:

"The court erred in its conclusions of law wherein it concludes that 'the fact that the Defendant Tucker, agent for the Defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the Plaintiffs requested and desired, when he could have done so, rendered both the Defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the Defendant, Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the Defendant, Texas & Pacific Railway Company, was not to be responsible for any injury occurring after said cattle left its line, will not relieve it, as said contracts are not binding on the Plaintiffs by
300 reason of duress'; Because it appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22nd., 1902, and that by the terms of said written contracts the liability of this Defendant, if any, was limited to such injuries and damage as might accrue to said cattle while they were in possession of this Defendant and being transported and carried over this Defendant's own line of railroad; that by the terms of said contracts this Defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this Defendant was not to be held or be deemed liable for any loss or damage sustained by Plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this Defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, within a reasonable time, and did there deliver the said cattle to the next connecting carrier without loss or damage to Plaintiffs, and that this Defendant did protect the through rate of freight named in said contracts; that this Defendant's line of railroad did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad or any line of railroad, owned and operated by this Defendant after they were delivered by this Defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this Defendant into the pens of the next connecting carrier, and said cattle were not thereafter in the possession of or under the control of this Defendant; that all the injury, loss and damage sustained by Plaintiffs in the shipment
301 and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said Cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the

request and with the consent of Plaintiffs, and that Plaintiffs executed and signed said contracts willingly and without objections or portest; that at the time said cattle were shipped this Defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this Defendant was not authorized and did not have any authority to ship said cattle upon through billing, and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T. upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this Defendant for shipment at Strawn, Texas, this Defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, to *to* bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate; whereupon Plaintiffs requested and directed said cattle be shipped via Paris, Texas."

First Proposition.

Where the conclusions of the court, (the case being tried before the Court) are unsupported by the evidence, it is the duty of the
302 court to set the judgment aside and grant the Defendant a new trial, upon request to do so.

Statement.

See Statement under first proposition to second assignment of error in this application of writ of error.

See statement under second proposition to second assignment of error in this application for writ of error.

See statement under fifth proposition to second assignment of error in this application for writ of error.

See statement under sixth proposition to second assignment of error in this application for writ of error.

Agent Tucker testified that he told Eastin, one of the Defendants in error, that the only thing that he could do was to give him a local rate to Ft. Worth in case he wanted his cattle shipped via Ft. Worth, and after he got to Ft. Worth, if he saw fit, he could turn over to the Frisco or to any other line he wished, giving him only the local rate and contract to Ft. Worth. (Trans. p. 88.)

The witness Chase, agent for Defendants in error testified: "Mr. Tucker might have said to us in that conversation that he would bill the cattle on the local rate to Ft. Worth, and there deliver them to us and let us ship them any way we desired, from that point, but I do not remember that he told us that; I cannot say that he did or did not offer to do that. (Trans. p. 80.)

S. W. Eastin, one of the Defendants in error testified; "I do not remember that Mr. Tucker said he could and would give me the local rate and ship the cattle to Ft. Worth and let me turn them over to the Frisco or anybody else there that I wanted to; if he had made such a proposition, I would not have accepted it; he possibly might have said it. But I do not recollect it. (Trans. p. 86.)

303 The witness Edmonson testified; "Mr. Tucker wanted to bill the cattle locally to Ft. Worth and let him re-bill them out of there, but Mr. Eastin would not do it." (Trans. p. 98.)

Authorities.

None are necessary.

Fourteenth Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the fourteenth assignment of error of Plaintiff in error which is as follows:

"The Court erred in the second paragraph of its findings of fact wherein the Court found as a fact 'That the Plaintiffs were desirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that Defendant, Tucker, knew this fact; and find that if Defendant Tucker had informed the Plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa over the St. Louis & San Francisco Railroad, he would have shipped them that way, if Defendant would have so done; because, 1st: Plaintiffs do not plead and allege that Defendant Tucker was informed or knew that Plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 2nd; there is no evidence before the Court showing that Defendant Tucker was informed or knew that Plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 3rd: Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman, and from there over the St. Louis & San Francisco Railroad if this Defendant would have so done; 4th: there is no evidence before the Court showing that Plaintiffs would have shipped said cattle to Sherman, and from there over the St. Louis & San Francisco to Tulsa if this Defendant would have so done; 5th: It appears

304 from the evidence that the Defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. Louis & San Francisco Railroad to Tulsa, I. T., but that Plaintiff Eastin directed and requested the Defendant Tucker to bill and ship said cattle to Paris, Texas."

First Proposition.

Findings of the Court not supported by both the allegations and the proof are erroneous and can not be made the basis of a judgment.

Statement.

Plaintiffs do not plead and allege that Defendant Tucker was informed or knew that Plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman, and from there over the St. Louis & San Francisco Railroad if this Defendant would have done so.

These matters can not be shown otherwise than by reference to the petition of the Defendants in error. (Trans. pp. 1 to 12, inclusive.)

There is not a word of testimony in the record of this case, showing that Defendant Tucker was informed or knew Plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; and there is not a word of testimony in the record of this case showing Plaintiff would have shipped said cattle to Sherman and from there over the St. Louis & San Francisco Railroad to Tulsa if this Defendant would have done so. This can not be shown otherwise than by reference to the testimony of the several witnesses set out in transcript. See testimony of the different witnesses. The evidence shows that Defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. Louis & San Francisco Railroad to Tulsa, I. T., and that Plaintiff Eastin
305 directed and requested Defendant Tucker to bill and ship said cattle to Parish, Texas. See statement under fifth proposition to second assignment of error in this application for writ of error. See finding of court. (Trans. p. 121.)

Authorities.

None are necessary.

Your petitioner represents that Thomas D. Sporer, who resides at Jacksboro in Jack County, Texas, is the Attorney of Record of Defendants in error, Eastin & Knox. That West, Chapman & West, who reside at Ft. Worth in Tarrant County, Texas, are the Attorneys of record for the said St. Louis & San Francisco Railroad Company.

Wherefore your petitioner prays for writ of error in said cause to the end that said cause may be brought before this Court, and the aforesaid errors be reviewed and corrected.

H. C. SHROPSHIRE,
Attorney for Plaintiff in Error, The Texas & Pacific Railroad Co.

Post-office, Weatherford, Texas.

Endorsed: App. No. 5250. In the Supreme Court of the State of Texas. The Texas & Pacific Railway Co. *et al.*, Plaintiffs in error, *vs.* Eastin & Knox, Defendants in Error. Petition for Writ of Error by the Texas & Pacific Ry. Co., Plaintiff in Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, November 7, 1906. Jas. A. Scott, Clerk by A. M. Mood. H. C. Shropshire, Attorney for T. & P. Ry. Co. Granted. Filed in Supreme Court Nov. 10, 1906. F. T. Connerly, Clerk, By J. S Myrick, Deputy.

Order Granting Application for Writ of Error of T. & P. Ry. Co.

March 20, 1907.

306 App. No. 5250.

TEXAS & PACIFIC RY. CO.
vs.
EASTIN & KNOX.

From Parker County, Second District.

This day came on to be heard the application of the Texas & Pacific Ry. Co. for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered it is ordered that said application be granted and the writ of error issue as prayed for.

Petition for Writ of Error by J. M. Tucker.

Filed Nov. 7, 1906.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

Petition for Writ of Error.

To the Honorable Supreme Court of Texas:

Your petitioner, J. M. Tucker, respectfully represents and shows to your Honorable Court, that the Court of Civil Appeals for the Second Supreme Judicial District of Texas, affirmed a judgment of the District Court of Parker County, Texas, in favor of Eastin & Knox, and against your petitioner, for the sum of $3600.00, for damages alleged to have been sustained by defendants in error in the shipment of a lot of cattle from Strawn, Texas, to Tulsa, I. T.

Your petitioner further says that each and all of the errors hereinafter assigned were presented to and urged upon the said Court
307 of Civil Appeals in a motion for a rehearing filed in said court, which motion said court overruled on the 13th. day of October, 1906.

That by reason of the errors committed by the said Court of Civil Appeals in its judgment and opinion in this case to your petitioner's prejudice and injury, and in order that the said errors may be corrected, your petitioner prays your Honorable Court to grant him a writ of error to said Court of Civil Appeals.

Statement of Nature and Result of Suit.

The Court will better understand the errors hereinafter assigned from a reading of the following statement of the nature and result of the case.

Eastin & Knox, plaintiffs below, instituted this suit in the District Court of Parker County, Texas, on the 4th. day of February, 1904, against this plaintiff in error and the Texas & Pacific Railway Company, to recover damages in the sum of $8000.00 growing out of the shipment of a lot of cattle from Strawn, Texas, to Tulsa, I. T. (Trans. pp. 1 to 12.)

On April 1st., 1904, this plaintiff in error filed his answer in said court by general exception and general denial; (Trans. p. 13,) and at the same time and on the same date The Texas & Pacific Railway Company filed in said court its petition and bond for removal of this case to the Circuit Court of United States for the Northern District of Texas, in which petition and bond for removal this Plaintiff in error joined. (Trans. pp. 14 to 18, inclusive.)

On April 5th. 1904, same being appearance day in District Court of Parker County, Texas, plaintiffs filed in said Court their first supplemental petition resisting removal of this case to said circuit Court of the United States for the Northern District of Texas, (Trans. pp. 19 to 22, inclusive,) and the Trial Judge thereafter, on
308 the same day, refused the petition for removal, (Trans. p. 23,) to which action of the Court this Plaintiff in error and the Texas & Pacific Railway Company reserved their bills of Exceptions (Trans. pp. 23 to 29, inclusive).

On November 9th., 1904, The Texas & Pacific Railway Company, by an amended answer, made the St. Louis & San Francisco Railroad Company a party to this suit and alleged that the delays and damages to the cattle were caused by reason of the negligence of the St. Louis & San Francisco Railroad Company, concluding with prayer in the alternative for apportionment of damages between the two roads, but in case that could not be done, for judgment over against the St. Louis & San Francisco Railroad Company in its favor in amount, equal to whatever amount might be awarded against it in favor of Plaintiffs. (Trans. pp. 31 to 57, inclusive.)

On the 9th. day of November, 1904, the St. Louis & San Francisco Railroad Company answered by general demurrer, general denials and special pleas (Trans. pp. 58 to 61, inclusive).

A jury being waived, the case was tried before the Court, resulting in a judgment, in favor of Plaintiffs against this Plaintiff in error and the Texas & Pacific Railway Company for the sum of $3,600.00 and against the St. Louis & San Francisco Railroad Company and in favor of the Texas & Pacific Railway Company for the sum of $1,800.00; from which judgment this Plaintiff in error, The Texas & Pacific Railway Company and the St. Louis & San Francisco Railroad Company appealed.

First Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the first assignment of error of this Plaintiff in error, which is as follows:

"The Court erred in its conclusions of law, wherein the
309 Court concludes: 'The fact that the Defendant Tucker, agent for the Defendant, the Texas & Pacific Railway Company, positively refused to route the cattle as the Plaintiffs requested and desired when he could have done so, rendered both the Defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the Defendant, Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the Defendant, Texas & Pacific Railway Company, was not to be responsible for any injury occurring after the cattle left its line will not relieve it, as such contract is not binding on the Plaintiffs by reason of duress;' Because, 1st: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts and in the shipment of said cattle, this Defendant acted and contracted avowedly as the agent of his co-defendant the Texas & Pacific Railway Company and that at the time of the execution or the making of said contracts for the shipment of said cattle and at the time of the shipment of said cattle, it was well known to Plaintiffs that the said Texas & Pacific Railway Company was the principal of this Defendant, and that this Defendant was the agent of the said Texas & Pacific Railway Company, and that this Defendant acted, and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; 2nd: It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction and at the request and with the consent of Plaintiffs; 3rd: It appears from the evidence that on or about the 18th. day of April, 1902, Plaintiff's agent, Mr. Chase, called upon this Defendant at the depot of the Texas & Pacific Railway Company at Strawn, Texas, and only stated to this Defendant that he wanted him, this Defend-
ant, to get or have eighteen cars ready for the shipment of
310 said cattle from Strawn, Texas, to Tulsa, I. T., on the 22nd. day of April, 1902, and for him to order said cars via Ft. Worth, Texas, and the Frisco; that at said time nothing else was said about said cars and that nothing was said by either this Defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be shipped and transported or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., and that at said time this Defendant did not agree to furnish said cars for the shipment and transportation of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of the Texas & Pacific Railroad and from Ft. Worth, Texas, over the line of the St. Louis & San Francisco Rail-

road Company; 4th: It appears from the evidence that said contracts only provided for the transportation of said cattle over the line of the Texas & Pacific Railroad from Strawn to Paris and did not provide for the transportation of said cattle from Strawn, to Tulsa, I. T., over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis and San Francisco road to Tulsa, I. T.; that this Defendant offered to bill and ship said cattle from Strawn, Texas, over the line of the Texas & Pacific Railway Company to Ft. Worth, Texas, upon a local rate of freight, or to bill and ship said cattle through upon through rate from Strawn, Texas, over the line of the Texas & Pacific Railway Company to either Sherman, Texas, or Paris, Texas; and that Plaintiff signed said contracts willingly and without objection or protest; 5th: that at the time of the shipment of said cattle, the Defendant, the Texas & Pacific Railway Company, did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle upon through rate and billing over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., and that at said time the
311 Texas & Pacific Railway Company was not authorized and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; and at said time, the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T., upon through billing and through rate and there is no evidence before the Court, showing that this Defendant owed Plaintiffs any duty which he failed to perform.

First Proposition.

When a person acts and contracts avowedly as the agent of another, who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal and involves no personal liability on the part of the agent.

Statement.

Defendants in error allege in their petition that the said J. M. Tucker was at said time the agent of said Defendants Company at the station of said Company at said Strawn, (Trans. p. 1) in the said County of Palo Pinto, and as such agent, doing, attending to and representing the said Defendant Railway Company in the transportation and shipping of freight, and especially live stock, and in the making of contracts therefor, from said station of Strawn. (Trans. p. 2.)

That this Plaintiff in error was the agent of the Texas & Pacific Railway Company and so acted and contracted in the handling and shipping of the cattle in controversy and that such facts were well known at the time to Defendants in error, is conclusively shown by

the records in this case and it will not be *b*ecessary to here insert more of the transcript to show such facts.

Authorities.

Hudson *vs.* Compers, 61 S. W. 389.
312 Behman *vs.* Feld, 37 Fed. Rep. 852.
Bradford *vs.* Eastburn, 2 Wash. (U. S.) 219.
Westinghouse Elec. & Mfg. Co. *vs.* Ins. Co. 129 Fed Rep. 213.
McDougal *vs.* Travis, 24 Hun (N. Y.) 590.
Pease *vs.* Francis, (R. I.) 55 656.
Hayman Co. *vs.* Knepper, 88 N. Y. S. 930.
Steinhauser *vs.* Spraul, 28 S. W. 624.
Am. *vs.* Eng. Ency. Law (2nd Ed.) Page 1119.
Shearm & Redf. on Neg. 111.
Cooley on Torts, pp. 140-1.

Remarks.

Mr. Cooley on his work on Torts, pages 140-1 says: "A common carrier undertakes for the transportation of goods from Mississippi to the sea-board. His duty by law is to carry safely and deliver within a reasonable time, and if he fails to do so he can only excuse himself by showing that the delays or injuries have resulted from the act of God or of the public enemy. Let it be supposed that the servants of the carrier are negligent in the performance of their tasks; they do not load the goods properly, or they delay trains unreasonably on the roads, and in consequence, when the goods reach their destination, and advantageous market that should have been secured is lost. On these facts it is plain that there had been a breach of duty owing to the consignor; and a breach, too, for which the servants of the carrier are blamable. But when we proceed to inquire whose duty has not been observed, it is equally plain that it is not that of the servant for with him the consignor had entered into no relations whatever. The servant owes duty to the carrier, his master, by whom he may be called to account for his negligence; but no third party by whom he has not been employed, can presume to hold him to responsibility for unfaithful service. The
313 consignor must, therefore, find his remedy against the party he employed, and the latter, if he has trusted to negligent servants, must assume the responsibility."

In case of McDougal *vs.* Travis, 24 Hun. (N. Y.) 590, the court says; "Where a freight agent refused to deliver freight to the consignee until certain charges had been paid, having no other interest in the goods than as an agent of the Railroad Company, it was held that an action of replevin would not lie against the agent for the recovery of the goods."

In Bradford *vs.* Eastburn, 2 Wash. (U. S.) 219, the Court says: "Where an agent *e*llegally refuses to deliver goods sent by his prin*cipl*e to him for others, upon a contract for their sale and delivery

made with the principle, the remedy is by action against the principle, and not against the agent."

In Hudson *vs.* Compere, 61 S. W. 390, Justice Williams, speaking for the Supreme Court of Texas says: "It is also a general rule of the law that the agent is not personally bound upon the contracts made in the name of his principle."

In the case of Steinhauser *vs.* Spraul, 28 S. W. 624, Justice Sherwood, speaking for the Supreme Court of Mississippi, says: "Now, in this case, nothing can be clearer than that the Defendant was acting within the orbit of her duty to her husband when giving the order alleged in the petition. This is the theory of the petition, which claims that the command was negligently given, owing to the fact that the ladder furnished for climbing into the loft, by reason of its length could not be used for that purpose with safety. So that it readily appears that Defendant, in giving the order, was not guilty of an act of direct and positive wrong to Plaintiff, but simply of giving an order in her husband's business which, solely owing to the length of the ladder furnished by her husband for the pur-
314 pose, and she having no other, was a negligent order. But it must be remembered that it was no part of Defendant's duty to furnish a ladder of proper length, nor does it appear she had the wherewithal to do so. If it was not her duty, then she can not be charged with even so much as negligence in failing to provide a ladder of requisite length, for negligence is simply duty violated or unperformed. The mere giving of the order, then, to get the pigeons, was not a negligent order. It was her husband's duty to furnish a ladder of proper length, and it is the rule that a servant is never liable for the negligence of his master, nor can an action be maintained against a servant unless he can be considered as a wrongdoer. A servant is never liable to a third person, merely for not doing that which it was the duty of the master to do.

As much can be said of the case at bar. It was no part of the duty of this Plaintiff in error to route and ship the cattle. It was the duty of this Plaintiff in error master, the Texas & Pacific Railway Company, to route and ship the cattle, and this Plaintiff in error can not be held liable to Defendants in error for not doing that which it was the duty of his master to do.

Second Assignment of Error.

Because the Court of Civil Appeals erred in failing to sustain the second assignment of error of this Plaintiff in error which is as follows:

"The Court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reasons set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas filed in this Court by this Defendant and his co-defendant, the Texas & Pacific Railway Company, and for the reasons as is more fully shown by this Defendant's bill of exception No. 1."

315 *First Proposition.*

A corporation created and organized under an act of Congress, or deriving its corporate powers and existence from congressional legislation is entitled to remove to a Federal Court any suit brought against it in a State Court, on the ground that such suit is one arising under the laws of the United States.

Statement.

This Court will take Judicial knowledge of the fact that the Texas & Pacific Railway Company is a Federal corporation.

Defendants in error in their original petition allege that the Texas & Pacific Railway Company is a body corporate, duly incorporated under the Federal Statutes. (Trans. p. 1.)

See petition and bond for removal. (Trans. pp. 14, 15, 16, 17, and 18.)

This Plaintiff in error joined the Texas & Pacific Railway Company in its petition and bond for the removal of this case to the Circuit Court of the United States for the Northern District of Texas, (Trans. pp. 16, 17, and 18.)

Defendants in error sued in this case to recover the total sum of $8,000. together with interest and cost. (Trans. p. 12.)

This suit was filed in the District Court of Parker, County, Texas, the 4th day of February, 1904, and citation issuing thereon was served upon this Plaintiff in error, which citation was returnable the first Monday in April, 1904, it being the 4th day of April, 1904, and this Plaintiff in error was not required by the laws of the State of Texas or the rules of the trial court to answer or plead to Defendants' in error petition before the 5th day of April, 1904, and this Plaintiff's in error petition and bond for the removal of this case to the Circuit Court of the United States for the Northern District of Texas was filed in the trial court on the 1st day of April,
316 1904, (Trans. pp. 1, 14, 17 and 18.)

Trial Court refused and overruled this Plaintiffs' in error petition and bond for removal of this case to the Circuit Court of the United States for the Northern District of Texas.

This Plaintiff in error in due time and manner excepted to the action of the trial Court in refusing and overruling its petition and bond for the removal of this case to the Circuit Court of the United States for the Northern District of Texas. (Trans. p. 23.)

See Bill of Exceptions No. 1 Trans. pp. 23 to 29, inclusive.)

Authorities.

Railway Co. *vs.* Eastin & Knox, 89, S. W. 440 and authorities therein cited.

The issue raised in this assignment of error is briefed in full in the application for a writ of error of this Plaintiffs' in errors co-plaintiff in error, The Texas & Pacific Railway Company, filed in

this case, and this Plaintiff in error here adopts all that part of the application for a writ of error of said Texas & Pacific Railway Company; that is, all propositions, statements and authorities appearing under the first assignment of errors in the said application for a writ of error of the Texas & Pacific Railway Company and respectfully prays the Court to consider the same as though each and all of said propositions, statements and authorities were here inserted in the same order under this assignment of error, in order to avoid a repetition of the same facts and matter in this application for a writ of error.

Your petitioner represents that Thomas D. Sporer who resides at Jacksboro in Jack County, Texas, is the attorney of record for Defendants in error, Eastin & Knox. That West, Chapman & West, who reside at Ft. Worth in Tarrant County, Texas, are the attorneys of record for the said St. Louis & San Francisco Railroad Company.

317 Wherefore your petitioner prays for writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid error be revi*i*red and corrected.

H. C. SHROPSHIRE,
Attorney for Plaintiff in Error, J. M. Tucker.

Post-office, Weatherford, Texas.

Endorsed: App. No. 5251. In the Supreme Court of the State of Texas. J. M. Tucker, Plaintiff in Error, *vs.* Eastin & Knox, Defendants in Error. Petition for Writ of Error by J. M. Tucker, Plaintiff in Error. Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas, November 7, 1906. Jas. A. Scott, Clerk, by A. M. Mood. H. C. Shropshire, Attorney for J. M. Tucker, Plaintiff in Error. Granted. Filed in Supreme Court Nov. 10, 1906. F. T. Connerly, Clerk. By J. S. Myrick, Deputy.

Order Granting Application for Writ of Error of J. M. Tucker.

March 20, 1907.

App. No. 5251.

J. M. TUCKER
vs.
EASTIN & KNOX.

From Parker County, Second District.

This day came on to be heard the application of J. M. Tucker for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for.

318 *Petition for Writ of Error by the St. L. & S. F. Ry. Co.*

Filed November 15, 1906.

In the Supreme Court of the State of Texas.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
TEXAS & PACIFIC RAILWAY COMPANY ET AL., Defendants in Error.

Application for Writ of Error.

To the Honorable the Judges of the Supreme Court:

The petition of the St. Louis & San Francisco Railroad Company for a writ of error from this Honorable Court to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, respectfully represents that applicant, otherwise styled Plaintiff in Error, is a Railway Corporation duly incorporated and doing business in the State of Texas, having an Agency in Tarrant County, Texas; That defendant in Error, The Texas & Pacific Railway Company is a railway corporation doing business in and having an Agency in Tarrant County, Texas; That Defendant in Error, J. M. Tucker is a resident of Strawn, Palo Pinto County, Texas, and both of said defendants in error have as their attorney of record in this cause, H. C. Shropshire, of Weatherford, Parker County, Texas; That defendants in error, Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, are residents of Jack County, Texas, and have as their attorney of record herein, Thos. D. Sporer, Esq., of Jacksboro, Texas.

Plaintiff in Error complains of the judgment, decision, and action of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in affirming a certain judgment of the District Court of Parker County, Texas, in favor of the Texas & Pacific Railway Company against it in a certain cause therein pending, in which the above mentioned Eastin & Knox were plaintiffs and the
319 said Texas & Pacific Railway Company and J. M. Tucker were defendants, and this plaintiff in error was impleaded in said cause and made a party defendant therein by said Texas & Pacific Railway Company, and in refusing and denying to applicant or plaintiff in error its motion for rehearing in said cause duly filed, all of which is manifest of record.

That the jurisdiction of this court may appear, petitioner shows that this was an action by the Texas & Pacific Railway Company against it to recover such judgment as might be rendered against it, the said Texas & Pacific Railway Company, in favor of the aforesaid Eastin & Knox and that the amount in controversy in each of said matters was more than One Thousand Dollars.

Petitioner further alleges that the trial in the District Court of Parker County, Texas resulted in a judgment in favor of Eastin & Knox against the Texas & Pacific Railway Company and J. M.

Tucker in the sum of $3600.00 and in favor of the Texas & Pacific Railway Company and over and against plaintiff in error in the sum of $1800.00 from which judgment this plaintiff in error prosecuted its appeal in due form of law to the Court of Civil Appeals for the Second Supreme Judicial District of Texas. That thereafter on June 16, 1906, the said Appellate Court affirmed the judgment in favor of said Texas & Pacific Railway Company against it in the sum of $1800.00 and thereafter a motion for rehearing in said cause duly filed by plaintiff in error was on October 13, 1906, refused by said Appellate Court. It will appear that the Appellate Court rendered no written opinion in this cause, but simply adopted the findings and conclusion of the trial court.

Complaint is here made by petitioner, as set forth in its motion for rehearing, of the action, judgment and decision of the Court of Civil Appeals in affirming the judgment of the trial court and in adopting its findings of fact and conclusion of law in so far
320 as applicant is concerned and in refusing and denying applicant's motion for rehearing in said cause duly filed, and it is here urged that the Court of Civil Appeals in the particulars complained of in said motion and in this application as follows:—

First Assignment of Error.

The Court of Civil Appeals erred in not sustaining this applicant's first and only assignment of error filed in said cause, which was as follows:—

"The judgment of the court awarding judgment against the St. Louis & San Francisco Railroad Company, in favor of the Texas & Pacific Railway Company is not only contrary to the law and the evidence, but is wholly unjustified and unsupported by the evidence adduced, and the law arising therefrom in this. The evidence undisputably and uncontrovertibly shows that in April, when Eastin & Knox tendered the cattle for shipment to defendant Texas & Pacific Railway Company from Strawn to Tulsa, I. T., that there was a contract in existence between the Texas & Pacific Railway Company and the St. Louis & San Francisco Railroad Company whereby cattle originating at Strawn, Texas, destined for shipment to Tulsa, I. T., or the territory in and about said place should be routed via Sherman, Texas, and should be delivered to the St. Louis & San Francisco Railroad Company at Sherman, Texas. The evidence further shows without dispute that Eastin & Knox desired to have said cattle shipped over the line of the St. Louis & San Francisco Railroad Company from Sherman, Texas to Tulsa, I. T. and the Agent of the Texas & Pacific Railway Company refused to so route or ship said cattle under a through rate; but insisted that the cattle must be shipped via Paris, Texas, and there delivered to the St. Louis & San Francisco Railroad Company for carriage to Tulsa, I. T., and the cattle were so shipped
and routed over the protest of the said shippers. The evi-
321 dence furthermore indisputably shows that the Texas & Pacific Railway Company, by thus routing said cattle, breached its contract with the St. Louis & San Francisco Railroad Company,

theretofore duly entered into concerning cattle shipments and detailed above; that by reason of the law requiring the St. Louis & San Francisco Railroad Company to receive cattle at the State line, when tendered by a connecting carrier, it had no choice in the matter, but was compelled to receive said cattle from the Texas & Pacific Railway Company at the state line, near Paris, Texas. The evidence likewise indisputably shows, and it is so concluded by the trial judge, that the Texas & Pacific Railway Company could have carried the cattle to Sherman, Texas, and there delivered them to the St. Louis & San Francisco Railroad, where the through rate agreement applied; that the distance from Strawn, Texas, to Tulsa, I. T. would have been the same via Sherman, Texas, and that the distance from Strawn, Texas via Sherman, Texas, to Tulsa, I. T. would have been about one half the distance between said initial and terminal points via Paris, Texas, and thereby the cattle necessarily remained in transit a greater length of time than would have been the case had the Texas & Pacific Railway Company routed same via Sherman, Texas, as under its agreement with the Frisco Road it was obliged to do; that by reason of such acts on the part of the Texas & Pacific Railway Company, the cattle were on the road for sixty hours, whereas, had they been shipped via Sherman, Texas, they would have only been on the road from 20 to 30 hours, and that because of such wrongful routing plaintiffs, Eastin & Knox, suffered damage, which would not have occurred, had the cattle been shipped and routed via Sherman, Texas."

Proposition.

The foregoing assignment of error is submitted as a proposition together with the following subsidiary propositions:—

322 *Proposition First.*

The statute making it obligatory upon every railroad to accept freight and cars tendered it by connecting lines, the fact that the Frisco road accepted the cattle tendered by the Texas & Pacific at Paris did not amount to a ratification of any acts on the part of the Texas & Pacific.

Proposition Second.

It being lawful in interstate transportation for one road to make a traffic agreement with another, and it appearing in this case that the Frisco and Texas & Pacific roads had an agreement whereby cattle originating at Strawn, Texas, should be routed via Sherman, and the Texas & Pacific violated the terms of such agreement and routed the cattle via Paris, the said railroad having breached its contract with the Frisco is in no position to recover damages from the Frisco in this case since both railroads were joint *tort feasors.*

Proposition Third.

It appearing from the evidence that had the Texas & Pacific Railroad complied with its contract with the Frisco and routed the cattle via Sherman no delay or other injuries would have occurred, it was error in the court to award damages to the Texas & Pacific as against the Frisco.

Proposition Fourth.

While a common carrier owes the duty to a shipper to use reasonable diligence and ordinary care in transporting cattle, still one common carrier does not owe such duty to another common carrier, which is merely a connecting line.

Proposition Fifth.

A party breaching its contract is entitled to no relief against another party where the original breach of the contract is the
323 proximate cause of the damage.

Proposition Sixth.

There being no contract of shipment between Eastin & Knox and the Texas & Pacific on account of duress in the execution of an alleged written contract, it was error in the court to limit the liability of the Texas & Pacific Railway Company to one-half the damage and make the Frisco liable for the other half of the damages.

Statement.

The trial court found in substance that Eastin & Knox applied to J. M. Tucker, as Agent of the Texas & Pacific Railway Company at Strawn, Texas, for certain cars to transport cattle from Strawn, Texas, to Tulsa, I. T., a station on the St. Louis & San Francisco Railroad Line. At the time of ordering said cars Eastin & Knox informed the Agent of the Texas & Pacific Railway Company that they wished to ship the cattle over the Texas & Pacific to Fort Worth, and from Fort Worth over the line of the St. Louis & San Francisco Railroad. That the agent of the Texas & Pacific informed plaintiffs that he could not route the cattle from Fort Worth over the St. Louis & San Francisco Road, plaintiffs still insisting upon such routing, but the agent of the Texas & Pacific refused to so route said cattle over any other route except from Strawn, Texas to Paris, Texas, over the Texas & Pacific, and from there over the St. Louis & San Francisco to Tulsa. That plaintiffs, for the purpose of getting their cattle shipped, signed certain contracts attached to the second amended answer of the Texas & Pacific Railway Company. This was unwillingly done, because it was the only means by which they could get their cattle shipped on through bills of lading. Plaintiffs had no place to put their cattle if they were not shipped through to Tulsa,

near which place they had pasturage for their cattle. Plain-
324 tiffs would not have signed said live stock contracts had not the said agent positively refused to route said cattle over any other route than by way of Paris. The distance from Strawn, Texas, to Tulsa, I. T. by way of Paris is about 600 miles. While to have shipped the cattle to Fort Worth or Sherman over the line of the Texas & Pacific Road and from there on over the Frisco would have been a direct route and only half as far as the route by way of Paris, The Texas & Pacific Road could have routed the cattle from Strawn to Tulsa via Fort Worth and could there have delivered them to the Frisco Road or the Texas & Pacific could have carried the cattle to Sherman, Texas, and there delivered them to the Frisco Road, as the line of the Frisco ran into Fort Worth and Sherman. The distance would have been about the same to have delivered the cattle to the Frisco Road at Sherman as to have so delivered them at Fort Worth. At the time the Texas & Pacific had no arrangement for through freight rate from St. Louis to Tulsa, via Fort Worth, but did have such an arrangement for through rate by way of both Sherman and Paris. That the route via Sherman was as short as the one via Fort Worth and would have suited plaintiffs as well as the way by Fort Worth.

After the cattle were delivered to the Frisco at Paris they were put in a muddy lot for feeding and watering but the pens were in such bad condition that they could not eat or drink but little, and on account of the muddy condition of the pens the cattle were damaged and injured. The cattle were held en route from Paris, to Tulsa 12 hours at night and otherwise injured. The cattle were in route from Strawn to Tulsa for 60 hours, when they should have reached Tulsa in from 20 to 30 hours had they been shipped by Sherman or Fort Worth over the Frisco to Tulsa. By reason of the extra time the cattle were on the cars, and by reason of being put in
325 muddy pens at Paris, and being side tracked and jerked and bumped and by reason of extra expense plaintiffs' cattle were injured and they were thereby damaged in the sum of $3600.00.

The court concluded that by positively refusing to route said cattle over any other route than by way of Paris, when there were other ways known to Tucker, the Agent of the Texas & Pacific, by which they could have been routed, and as he knew the plaintiffs wished them to be routed, liability attached. The court further found that the shipping contracts were signed by reason of duress and for that reason are not binding on plaintiff. The court further found that one-half of the injury sustained by the cattle was on account of the extra time they were kept on the cars and by the extra distance they had to be hauled by being carried via Paris, and the other one-half was caused by the negligent handling of the cattle by the Frisco after it received the cattle.

The court found further that plaintiffs were desirous of shipping their cattle by the shortest and most direct route from Strawn, Texas to Tulsa, I. T. and that defendant Tucker knew this fact and if he had informed plaintiffs that they could ship their cattle via

Sherman and from there to Tulsa over the Frisco plaintiffs would have so shipped that way. (See Findings of Fact, Tr. 121 to 125.)

As a matter of law the court concluded that defendant, T. & P. is entitled to recover against the Frisco $1800.00 damages, being the amount of damages caused to the cattle by reason of the negligence of the Frisco. (Tr. 126.)

It was shown by the undisputed and uncontroverted testimony of the witness Brashier, who was Chief Clerk in the General Freight Office of the Frisco, that there was a tariff agreement between the Frisco and Texas & Pacific whereby cattle originating at
326 Strawn, Texas, destined for shipment to the Indian Territory, to Tulsa, I. T., on the line of the Frisco, should be routed via Sherman, Texas on a through rate. Mr. Brashier further testified that is these cattle had been presented to the Frisco at Fort Worth they would probably have accepted them, but not on the through rate at that point. The arrangement the Frisco had at that time for through rate was via Sherman, Texas.

Under this agreement if the Texas & Pacific had offered the cattle to the Frisco at Fort Worth, the Frisco could have compelled them to deliver them to it at Sherman, Texas. (See evidence of H. C. Brashier, Tr. 112 to 115.)

Authorities.

G. C. & S. F. Ry. Co. *vs.* Dwyer, 75 Texas 581-582.

Wherefore, premises considered, applicant prays that a writ of error issue from this Honorable Court to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, to the end that upon consideration of the errors and complaints herein assigned, the judgments of the District Court of Parker County and the Court of Civil Appeals for the Second Supreme Judicial District of Texas, be reversed and this cause be remanded to the District Court for a new trial in accordance with principles of law or here rendered in applicant's favor. And to this end your applicant will ever pray, etc.

C. H. YOAKUM,
WEST, CHAPMAN & WEST,
THEODORE MACK,
Attorneys for Applicant, St. Louis & San Francisco Railroad Company.

Endorsed: St. Louis & San Francisco Railroad Company, *vs.* Texas & Pacific Railway Company, *et al.* App. No. 5257. In the Supreme Court of Texas. Application for Writ of Error. Filed in Court of Civil Appeals, Second Supreme Judicial District of Texas, November 10, 1906, J. A. Scott, Clerk, Filed in Supreme Court Nov. 15, 1906, F. T. Connerly Clerk, By J. S. Myrick, Deputy. C. H. Yoakum, Theodore Mack, West, Chapman & West, Attorneys for Applicant. Granted.

327 *Order Granting Application for Writ of Error of the St. Louis S. F. & R. R. Co.*

March 20, 1907.

App. No. 5257.

ST. LOUIS & S. F. R. R. Co.
vs.
TEXAS & PACIFIC RY. CO. ET AL.

From Parker County, Second District.

This day came on to be heard the application of the St. Louis & San Francisco Ry. Co. for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for.

Order of Submission.

April 17, 1907.

No. 1688.

TEX. & PACIFIC R. R. Co. & J. M. TUCKER
vs.
EASTIN & KNOX ET AL.

From Parker County, Second District.

Submitted on briefs and orally for both parties.

Opinion.

Filed May 15, 1907.

No. 1688.

TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

From Parker County, Second District.

This case was before us at the last term of this court and our determination of the point then presented is reported in the 15th Texas Court Reporter on page 646. The Court of Civil Appeals had held, that the petition for a removal of the case to the Circuit
328 Court of the United States was good, and that it deprived the state court of jurisdiction of the controversy and therefore de-

clined to proceed further in determining the questions raised on the appeal. Being of the opinion that the Court of Civil Appeals erred in their ruling on the point, we reversed the judgment and remanded the case to that court for their action upon the other errors assigned. Having considered the case after the remand, that court approved the conclusions of fact and law of the trial court and affirmed the judgment.

Our former opinion gives a partial statement of the case, and so much as is there stated will not here be repeated. The defendant the Texas & Pacific Railway Company made the St. Louis & San Francisco Railway Company a party to the suit and impleaded it; praying that in the event the plaintiffs recovered against it, the Texas & Pacific Railway Co., for the damages, that accrued on the line of the St. Louis & San Francisco Railway Co., it have a recovery over against the latter for the amount. The case was tried before the court without a jury and resulted in a judgment against both the original defendants for $3600.00 and a judgment in favor of the Texas & Pacific Railway Company against the St. Louis & San Francisco Railway Company for one half of that amount. All parties against whom judgment was rendered appealed to the Court of Civil Appeals and each of them have applied to this court for a writ of error which has been granted.

The first assignment of error in the application of the Texas & Pacific Railway Company is to the effect, that the court erred in retaining jurisdiction of the cause after the petition and bond for removal were filed. This question was considered and decided by us at the last term of this court adversely to the railroad company. In the opinion then rendered, (T. & P. Ry. Co. *v.* Eastin & Knox, 15 Ct. Rep. 646) we followed the decision made on the same day in the case of the same Company against Huber (15 Ct. Rep., 642) in which the same question was involved and was more fully discussed. We adhere to our former conclusion upon this question.

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Upon this point we will, however, add that we have carefully examined the report of the case of Wecker *v.* The Nationer Enameling & Stamping Co., (27 Sup. Ct. Rep., 184) decided since our former opinion was written, and find nothing in it contrary to our views as therein expressed. In that case Wecker brought suit in a court in the state of Missouri against the Enameling Company, a non-resident corporation, Harry Schenck, also a non-resident, and George Wettengel, who resided in the state where the suit was brought. The plaintiff sued to recover damages for personal injuries and alleged a state of facts which showed a joint cause of action against all the defendants. The defendant company filed in the state court a petition for a removal of the cause to the Circuit Court of the United States in which, among other grounds, it claimed that Wettengel was fraudulently made a joint defendant for the purpose of preventing the removal of the cause and specifically alleged facts, which, if true, showed that there was no liability on his part. The record having been filed in the Circuit Court of the United States, the issue thus made was tried, and the court found, that the facts stated in the ap-

plication for a removal of the cause were true and that the plaintiffs allegations to show the joint liability of Wettengel were fraudulent and therefore retained jurisdiction of the cause. A writ of error was sued out and the case brought to the Circuit Court of Appeals of the United States, which court certified the question to the Supreme Court of the United States. That court held that the Circuit Court did not err in refusing to remand the cause to the state court; and placed their decision upon the ground,—as we understand the opinion,—that the petition for removal alleged facts, which
330 showed, that Wettengel was not a proper party defendant and that he was fraudulently joined as such. It is clear that the Supreme Court of the United States in the case discussed, did not hold that it was sufficient in such a case to support a petition for removal to allege merely that the joinder of the party was fraudulent, without allegations of facts from which that conclusion could be drawn. For the reason, that the opinion elaborates the facts alleged in the petition and the conclusion of the court, that the facts were established upon the hearing of the issue, it seems to us that it is but a reasonable deduction, that the court regarded both the allegation and the proof as necessary to secure a removal.

The case having been tried without a jury the trial judge found, in substance, that the plaintiffs applied to defendant Tucker, as agent of the defendant, the Texas & Pacific Railway Company, for cars to ship their cattle to Tulsa in the Indian Territory and informed him that they desired to ship the cattle to Ft. Worth, Texas, and thence over the St. Louis & San Francisco Railway Company to their destination; that the cattle were brought to the depot and after most of them were loaded on the cars, the agent, Tucker, presented to Eastin, one of the plaintiffs, who was in charge of the business for the firm, live stock contracts for shipping the cattle to Paris, Texas, and thence over the line of the St. Louis & San Francisco Railway Company to their destination; that Eastin objected to the shipment by that route, and that he was then told by the agent that he could not route the cattle to Tulsa any other way except by Paris; and that *that* in order to get their cattle shipped, Eastin signed the contracts. It was also found that the contracts were signed against the will of plaintiff for the reason that it was necessary that the cattle should be shipped and it was believed that there was no other route by which they could be sent except by way of Paris. It was
331 further found that there were two other routes by which the cattle might have been transported to Tulsa over the St. Louis & San Francisco Railway Company's lines, one by way of Ft. Worth, and the other by way of Sherman, each of which was about 290 miles in length, which was about one half the distance via Paris, and that the defendant had an arrangement with its connecting line for a through shipment by way of Sherman; but that the plaintiffs did not know this fact. The court further found, that the cattle were damaged both by reason of their longer detention on the cars growing out of the longer transit and by the negligence of the connecting carrier, after the cattle were delivered to it. In its conclusions of law the Court held, that the written contracts were obtained by duress

and were therefore invalid, and that the Texas & Pacific Railway Company and Tucker, its agent, were responsible to the Plaintiffs for the damages.

It is elementary law that if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss, which occurs either on his own or his connecting lines. By the deviation he becomes an insurer of the goods. It is also settled that when goods are delivered to a carrier for transportation to a designated point, it is his duty as a general rule to transport them by the safest and most direct route. If instructed as to the route he selects a different one, he becomes responsible for any loss that may occur in transit. (Express Co. *v.* Kountze Bros., 8 Wall., 342. In the case cited the court say: "If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in defiance of the wishes of the owner of the property, reject the safe, and adopt the hazardous route." If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he
332 should be held liable for all losses, when shipped over a route contrary to the express instructions of the shipper.

The numerous asignments of error of the Texas & Pacific Railway Company upon the merits are mainly directed to the findings of fact of the trial judge. In some instances it is claimed that that facts found are not alleged and in others that they are not supported by the evidence. As to all these we deem it sufficient to say, that there is enough alleged and enough proved as alleged to show the liability of that company. It is also assigned on behalf of that company that the court erred in holding it responsible for the negligence of the St. Louis & San Francisco Railway Company. As already intimated, we are of opinion, that by refusing to ship the cattle as directed by the plaintiff, the Texas & Pacific Railway Company became responsible for all damages which accrued from the shipment.

In regard to the assignments of plaintiff in error, Tucker, we think, that in routing the cattle by way of Paris, contrary to the directions of the shippers, he was guilty of misfeasance—and not simply of nonfeasance, and is therefore liable for the loss. This matter was discussed in our former opinion.

In the application for the writ of error of the St. Louis & San Francisco Railway Company, no complaint is made of the manner in which it was brought into the case. The only error specified is that the court erred in rendering judgment in favor of the Texas & Pacific Railway Company against it for the damages which occurred on its line. The St. Louis & San Francisco Railway Company were responsible to the plaintiffs for all damages which accrued to their cattle by reason of its negligence while on its hands—notwithstanding the liability of the initial carrier for the same loss.

The Texas & Pacific Railway Company having become an
333 insurer of the cattle after they were delivered to its connecting carrier,—when it was adjudged to pay for the negligence of the latter, it was subrogated to the right of the plaintiffs and had the right to be reimbursed for what it was required to pay

on account of the negligent conduct of the St. Louis & San Francisco Railway Company.

We find no error in the judgment and it is affirmed

R. R. GAINES,
Chief Justice.

Endorsed: No. 1688. Texas & Pacific Ry Co. *et al., vs.* Eastin & Knox. Opinion. Judgments Affirmed. Filed in Supreme Court of Texas May 15th, 1907. F. T. Connerly, Clerk. Gaines, Ch. Jus.

Judgment.

May 15, 1907.

No. 1688.

TEXAS & PACIFIC RY. CO. ET AL.
vs.
EASTIN & KNOX.

From Parker County, Second District.

Opinion delivered by Chief Justice GAINES:

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Second Supreme Judicial District, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of Civil Appeals, and these having been duly considered, because it is the opinion of this court there was no error in the judgment of the District Court and the Court of Civil Appeals, it is therefore considered, adjudged and ordered that said judgments be affirmed; that the Defendants in Error, Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, do have and recover of and
334 from the Plaintiffs in error J. M. Tucker and the Texas & Pacific Railway Company and their sureties Edw. O. Tenison and C. R. Buddy, the amount adjudged in the District Court; that the Plaintiff in error, The Texas & Pacific Railway Company do have and recover of and from the Plaintiff in Error, the St. Louis & San Francisco Railway Company and its sureties, W. Scott and H. C. Holloway, the amount adjudged in the District Court, in favor of the said Texas & Pacific Railway Company. It is further ordered that the Defendants in Error, S. W. Eastin and D. L. Knox do have and recover of the Plaintiffs in Error, the Texas & Pacific Railway Company and J. M. Tucker and their sureties Edw. O. Tenison and C. R. Buddy and of and from the Plaintiff in error, The St. Louis & San Francisco Railway Company, and its sureties, W. Scott and H. C. Holloway, all costs in this behalf expended in this court and in the court of Civil Appeals, and this decision be certified to the District Court for observance.

Motion for Rehearing by the Texas & Pacific Ry. Co.

Filed May 28, 1907.

In the Supreme Court of the State of Texas.

No. 1688.

THE TEXAS & PACIFIC RAILWAY CO. ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

Appeal from the District Court of Parker County, Texas.

Application for Rehearing.

Now comes the Texas & Pacific Railway Company, one of the plaintiffs in error in the above numbered and entitled cause, and moves the court to set aside the judgment heretofore rendered in this cause affirming the judgment of the Court of Civil Appeals and the judgment of the court below, and to grant it a rehearing,
335 and reverse the judgment of the court below for the following reasons, to-wit:—

First. Because the court erred in failing to sustain the first assignment of error of this plaintiff in error, which is as follows:

"The court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reason set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, filed in this court by this defendant, and its co-defendant, J. M. Tucker, and for the reasons as is more fully shown by this defendant's bill of exception No. 1."

Statement.

Plaintiff in error at the time this suit was filed against it, and now is, a corporation created and organized under an Act of Congress, and deriving its corporate powers and existence from Congressional legislation, See Defendants' in Error petition. Trans. p. 1. Plaintiff's in Error petition and bond for removal. Trans. pp. 14, 15 and 16.)

Plaintiff in Error's bond for removal was good and sufficient. (Trans. pp. 16, 17 and 18.)

The plaintiff in error, J. M. Tucker, joined this plaintiff in error in its petition and bond for removal of this case. (Trans. pp. 16,—17, and 18.) Defendants in error sued in this case for the sum of $8000.00 (Trans. p. 12.) The removal petition and bond were filed in the trial court in due time. (Trans pp. 1, 14, 17 and 18.)

The trial court refused to remove this case to the Circuit Court of the United States for the Northern Disriet of Texas. (Trans. pp. 23.)

The defendant J. M. Tucker was improperly and fraudulently joined with this plaintiff in error for the sole and only purpose of preventing the removal of this case to the Federal Court.
336 (Trans. p. 15.)

Defendants in error do not question the sufficiency of the allegations in Plaintiff in Error's petition as to the fraudulent joinder of plaintiff in error J. M. Tucker. See Defendants in error's petition. (Trans. p. 1.)

Plaintiff in error set up at least a *prima facie* case in its petition and its allegations as to the fraudulent joinder of the plaintiff in error J. M. Tucker, were sufficient, in the absence of exception thereto, to require the state court to remove the case to the federal court for the purpose of trying the issue of fact of fraudulent joinder in that court. (Trans. pp. 15.)

See bill of exception No. 1. (Trans. pp. 23 to 29, inclusive.

Plaintiff in error excepted to the action of the trial court in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas. (Trans. p. 23.)

Defendants in error do not claim that this plaintiff in error personally participated in the acts of negligence of which they complain otherwise than by and through the acts of its agent, J. M. Tucker. See defendants in error's petition. (Trans. p. 1.)

Authorities.

Railway Co. *vs.* Eastin & Knox, 89 S. W. 440.
Railway Co. *vs.* Watson, 43 S. W. 1060.
Railway Co. *vs.* Davis, 55 S. W. 562;
Railway Co. *vs.* Myers, 115 U. S. 1.
Martin *vs.* Railway Co., 134 Fed. Rept. 134.
Butler *vs.* National Home, 144 U. S. 64.
Railway Co. *vs.* Cox, 145 U. S. 593.
Supreme Lodge K. Of P. *vs.* Hill, 36 Fed. Rept. 468.
Allen *vs.* Railway Co., 25 Fed. Rept. 513.
337 Railway Co. *vs.* McComb 1 Fed. Rept. 799.
Cruikshank *vs.* Bank, 16 Fed. Rept. 888.
Texas & Pacific Railway Co. *vs.* Coddy, 166 U. S. 609.
Cummings *vs.* City of Chicago, 188 U. S. 426.
Lund *vs.* Railway Co., 78 Fed. Rept. 385.
Ames *vs.* Kansas, 111 U. S. 449.
Railway Co. *vs.* California, 118 U. S. 109.
Texas *vs.* Railway Co., 3 Woods (U. S.) 308.
Illinois *vs.* Railway Co., 33 Fed. Rept. 721.
Act of Congress, March 3, 1887, pertaining to removal of causes.
Railway Co. *vs.* Young, 27 S. W. 145.
Bloom *vs.* Railway Co., 85 Texas, 285.

Second. Because the court erred in failing to sustain the second assignment of error of this plaintiff in error which is as follows:

"The judgment is contrary to law and unsupported by the evi-

dence in this: It appears from the evidence that the cattle on controversy were shipped upon through live stock contracts in writing, dated April 22nd, 1902, and that by the terms of said written contracts, the liability of this defendant, if any, was limited to such injuries and damage as might accrue to said cattle while they were in the possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts, this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight
338 named in said contracts; and this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver the said cattle to the next connecting carrier, without loss or damage to plaintiffs, and that this defendant did protest the through rate of freight named in said contracts; that this defendant's line of railway did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad, or any line of railroad owned and operated by this defendant, after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed the contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any
339 authority to ship said cattle upon through billing and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and re-

core-ed by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate, whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas."

Statement.

The cattle were shipped upon contracts in writing which limited the liability of this plaintiff in error to its own line. (Trans. pp. 101 to 112.)

The cattle were carried to Paris, Texas, by this plaintiff in error, and were there delivered to the next carrier without loss or damage to defendants in error. Testimony of Frank Chase. (Trans. p. 76.)

All the loss or damage to said cattle occurred while the same were in the possession of the St. Louis & San Francisco Railroad Co. Testimony of witness Chase. (Trans. pp. 75, 76, 68, 69 and 82.)

The through rate specified in the contracts upon which the cattle were shipped was $57.50 per car. The local rate was $58.40. (Trans. pp. 101 and 107.)

Defendants in error signed the contracts willingly and without objection or protest. See testimony of witness Chase. (Trans. p. 80.) Witness Eastin. (Trans. p. 87.)

340 This plaintiff in error did not have authority to bill and ship the cattle upon a through rate via Ft. Worth as claimed by defendants in error. Testimony of witness J. M. Tucker. (Trans. pp. 88, 94, 95.) Witness Brashier. (Trans. pp. 112, 114, 115, 117.)

Authorities.

Railway Co. *vs.* Beaird, 75 Tex. 256.

Remarks.

A carrier which makes a through shipment under a special contract for a reduced rate of freight is not liable for an injury to the shipment on a connecting line, though it did not choose the through route which the shipper preferred.

Railway Co. *vs.* Short; 25 S. W. 142.

Where a carrier has no authority from connecting carriers to contract for through shipments except by a certain route, a shipper contracting for through shipment cannot recover damages to the shipment occasioned by their having gone that way instead of another.

Railway Co. *vs.* Everetts, 89 S. W. 761; Railway Co. *vs.* Buchanan, 94 S. W. 199.

Third. Because the court erred in failing to sustain the third assignment of error of this plaintiff in error, which is as follows: "The judgment is contrary to law and unsupported by the evi-

dence in this: There is no legal or sufficient evidence before the court, showing the market value of the cattle in controversy at Tulsa, I. T., at the time of their arrival there, in the condition in which they were delivered at Tulsa, I. T., and there is no legal or sufficient evidence before the court, showing the market value of such cattle at Tulsa, I. T., at the time of their arrival there, had the cattle been delivered at Tulsa, I. T., with due care and in proper condition; there is no legal or sufficient evidence before the
341 court, showing the difference between the market value of the cattle at Tulsa, I. T., at the time of their arrival there, in the condition in which they did arrive there, and the market value of said cattle at Tulsa, I. T., at the time of their arrival there had they been delivered there at said time in due time, and in proper condition; wherefore the defendant says the judgment is excessive."

Statement.

The witness Chase says: "I do not know what the market value of these cattle were at Tulsa." (Trans. p. 77.)

The witness Eastin says: "I do not know anything about what the market value of these cattle was at Tulsa on April 23, (the day the cattle arrived there), except from the fact that I was there in May following." (Trans. p. 85.)

This is all the testimony on this subject.

Authorities.

None are necessary.

Fourth. Because the court erred in failing to sustain the fourth assignment of error of this plaintiff in error, which is as follows: "The judgment is contrary to law and unsupported by the evidence in this:

The judgment is excessive in this: It appears from the evidence that said cattle would naturally have sustained some damage in the shipping and transportation of them from Strawn, Texas, to Tulsa, I. T., regardless of how they were handled upon the train and elsewhere during transportation; that only twenty-nine head of said cattle were killed or died from injuries received while being
342 carried and transported from Strawn, Texas, to Tulsa, I. T., and that the balance of the grown cattle, being some 585 head, were damaged to the extent of about five or six dollars a head; that of this number some five hundred and fifty head were cows, about all of which were with calves, and that a great number of said cows lost their calves by reason of the treatment they received during the time they were being carried and transported upon the cars; that the greater part of the damage and injury sustained by the cows which lost their calves was caused by reason of their having lost their calves; that at the time said cows were tendered and received by this defendant for shipment, and at the time said cattle were loaded upon defendant's cars and shipped by this defendant, and at the time and execution and making of the contracts upon which said cattle were shipped, this defendant did not know and

was not informed that any of said cows were with calves, and there was nothing in the appearance of said cows which indicated to this defendant or its agent, J. M. Tucker, that such cows were with calves. That plaintiffs do not plead or allege that this defendant was informed or knew that any of said cows were with calves or that there was anything in the appearance of said cows that indicated that any of said cows were with calves."

Statement.

Defendants in error do not plead or allege that this plaintiff in error did have notice of the fact that any of said cows were with calves. (Trans. pp. 1 to 12.)

Chase says they were worth at least five or six dollars per head less on account of the treatment they received (Trans. p. 70), and that the shipping of cows with calf has a tendency to cause them to drop their calves; and that in all probability these cows would have dropped their calves irrespective of the route over which they were shipped. (Trans. p. 78.)

343 Authorities.

Railway *vs.* Fagan, 27 S. W. 887.

Fifth. Because the court erred in failing to sustain the fifth assignment of error of this plaintiff in error, which is as follows: "The court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the 29 head of said cattle were of the value of $20.00 per head, and that the balance of the grown cattle were damaged five dollars per head, and that plaintiffs were damaged in the sum of $3600.00."

Statement.

See statements under third and fourth assignments of error.

Authorities.

None are necessary.

Sixth. Because the court erred in failing to sustain the sixth assignment of error of this Plaintiff in error, which is as follows: "The court erred in the second paragraph of its findings of fact in finding as a matter of fact, that the balance of the grown cattle were damaged five dollars per head."

Statement.

See statement under fifth assignment of error.

Authorities.

None are necessary.

Seventh. Because the court erred in failing to sustain the seventh assignment of error of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its finding of fact, wherein it found as a matter of fact, that on or about the 18th day of April, 1902, Plaintiffs applied to the defendant J. M.
344 Tucker, agent of the Texas & Pacific Railway Company, at Strawn, Texas, for 18 stock cars, to be furnished at Strawn on the 22nd of April, 1902, for the purpose of shipping 18 cars of cattle from said station of Strawn on defendant's line of railroad to Tulsa, a station on the St. Louis & San Francisco Railroad in the Indian Territory. That the plaintiffs at the time of ordering said cars informed the defendant Tucker, as agent of The Texas & Pacific Railway Company, that they wished to ship their cattle from Strawn, to Ft. Worth, Texas, over the Texas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company. That said Tucker, as such agent, agreed to and did furnish said cars at Strawn on the 22nd of April, 1902; because, first: Plaintiffs do not plead and allege in their petition that they did so inform the defendant Tucker, as agent of this defendant, at the time they ordered said cars that they wished to ship said cattle from Strawn to Ft. Worth, Texas, over the T xas & Pacific Railroad, and from Ft. Worth, Texas, to Tulsa, I. T., over the line of the St. Louis & San Francisco Railroad Company; 2nd: It appears from the evidence that the defendant Tucker, as agent of this defendant, did not agree to, and did not furnish said cars on the 22nd day of April, 1902, for the purpose of shipping said cattle over the line of this defendant's road from Strawn, Texas, to Ft. Worth, Texas, and from there on over the line of the St. Louis & San Francisco Railroad Company to Tulsa, I. T."

Statement.

Defendants in error do not plead that they did so inform agent Tucker at the time they ordered the cars that they wanted to ship over the T. & P. Ry. Co. to Ft. Worth and from there over the St. Louis & San Francisco. (Trans. pp. 1 to 12.)

Witness Chase says: I told Tucker that I wanted them shipped Frisco from Ft. Worth. (Trans. p. 154.)

345 Authorities.

Eighth. Because the court erred in failing to sustain the eighth assignment of error of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact that late in the evening of the 22nd day of April, 1902, and after most of the cattle were loaded, the agent of the defendant, The Texas & Pacific Railway Company, the said J. M. Tucker, one of the defendants herein, presented to S. W. Eastin, one of the plaintiffs, the live stock contracts attached to the second amended original answer of the defendant Texas & Pacific Railway Company, for his signature, which contracts were

for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., over The Texas & Pacific Railroad to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa; that when said Eastin was informed that his cattle were routed by Paris, he objected, and stated that the route was much further than by way of Ft. Worth, and from there over the St. Louis & San Francisco railroad, and stated at the same time that he wanted his cattle routed from Ft. Worth over the said St. Louis & San Francisco railroad to Tulsa, I. T. Said agent Tucker then and there informed the plaintiff Eastin, that he could not route the cattle from Ft. Worth over said St. Louis & San Francisco road, and said Eastin insisted that he could, but said Tucker refused to route said cattle through from Strawn, to Tulsa, I. T., over any other route except by its own line to Paris, and from there on over the St. Louis & San Francisco road to Tulsa, I. T., and the said Eastin finally, for the purpose of getting his cattle shipped signed said contracts attached to said second amended original answer of the defendant, Texas & Pacific Railway Company; he did this unwillingly, because he thought that
346 was the only means by which he could get his cattle shipped through from Strawn, Texas, to Tulsa, I. T., on a through bill of lading. That the plaintiffs had no place to put the cattle if they were not shipped through to Tulsa, I. T., near which place they had pasturage for said cattle. The plaintiff Eastin would not have signed said live stock contracts had not the said Tucker positively refused to route the cattle through over any other route than by way of Paris, and had he not believed that was the only means by which he could get his cattle shipped through to Tulsa; because, 1st; It appears from the evidence that at the time said contracts were presented to the plaintiff Eastin but little more than half of said cattle were loaded on the cars; 2nd: It appears from the evidence that said contracts only stipulated and provided for the transportation of said cattle from Strawn, Texas, over the road of this defendant to Paris, Texas, and did not stipulate and provide for the transportation of said cattle from there on over the St. Louis & San Francisco road to Tulsa, I. T.; 3rd: It appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest; 4th: It appears from the evidence that at said time the said J. M. Tucker, agent of this defendant, offered to route said cattle through via Sherman, Texas, or via Paris, Texas, and that said cattle were routed via Paris, Texas, under the direction and at the request and with the consent of plaintiffs."

Statement.

See statement under second assignment of error.

Authorities.

Ninth. Because the court erred in failing to sustain the ninth assignment of error of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact that this defendant "could have

routed said cattle through from Strawn, to Tulsa by way of
347 Ft. Worth, and could there have delivered them to said St. Louis & San Francisco road; "because, first; It appears from the evidence that at the time of the shipment of said cattle this defendant did not have any arangement or agreement with the said St. Louis & San Francisco road for the shipment and transportation of said cattle upon through billing and a through freight rate via St. Louis & San Francisco railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant did not have any authority and was not authorized to route said cattle upon through billing and a through rate over the line of road of the said St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T.; 2nd: It appears from the evidence that at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried and transported the same over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate."

Statement.

There is no testimony in the record of this case showing this plaintiff in error could have routed said cattle through to Tulsa upon a through freight rate via Ft. Worth. See statement under second assignment of error.

Authorities.

Tenth. Because the court erred in failing to sustain the tenth assignment of error of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact 'that the plaintiffs at the time of said shipment did not know that they could have their cattle shipped over the Texas & Pacific Railway to Sherman, and from there over the St. Louis & San Francisco Railroad; that the
348 route via Sherman was as short as the one by Ft. Worth, and would have suited them, the plaintiffs, as well as the way by Ft. Worth," because, first: It appears from the evidence that at the time said cattle were received and shipped by this defendant, plaintiffs were told and informed by this defendant's agent, J. M. Tucker, that this defendant could and would bill and ship said cattle upon a through freight rate via Sherman, Texas; 2nd: There is no evidence before the court showing or tending to show that the route via Sherman would have suited plaintiffs as well as the way by Fort Worth, Texas."

Statement.

See statement under second assignment of error.

Authorities.

Eleventh. Because the court erred in failing to sustain the eleventh assignment of error of this plaintiff in error, which is as follows:

"The court erred in the second paragraph of its findings of fact, wherein the court found as a fact 'that said shipping contracts were signed by the plaintiff Eastin by reason of duress, and for that reason, not binding on plaintiffs;" because, it appears from the evidence that the plaintiff Eastin signed said contracts willingly and without objection or protest.'"

Statement.

The witness Chase expected to have to sign the contracts and did not object to doing so. (Trans. pp. 71, 72 and 82.)

S. W. Eastin expected to sign the contracts and did not object to doing so. (Trans. p. 85.)

Authorities.

Twelfth. Because the court erred in failing to sustain the twelfth assignment of error of this plaintiff in error which is as fol-
349 lows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a matter of fact that the said 'Tucker refused to route the said cattle through from Strawn to Tulsa, I. T., over any other route except by this defendant's own line to Paris, and from there on over the St. Louis & San Francisco road, to Tulsa, I. T.;' because it appears from the evidence that the said Tucker offered to route said cattle through from Strawn to Tulsa, I. T., over this defendant's own line to Sherman, Texas."

Statement.

See statement under second assignment of error.

Authorities.

Thirteenth. Because the court erred in failing to sustain the thirteenth assignment of error of this plaintiff in error which is as follows:

"The court erred in its conclusions of law wherein it concludes that 'the fact that the defendant Tucker, a[illegible] for this defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the plaintiffs requested and desired, when he could have done so, rendered both the defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant, Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant, Texas & Pacific Railway Company, was not to be responsible for any injury occurring after said cattle left its line, will not relieve it, as said contracts are not binding on the plaintiffs by reason of duress;' because it appears from the evidence that the cattle in controversy were shipped upon two live stock contracts in writing, dated April 22, 1902, and that by the terms of said written

contracts the liability of this defendant, if any, was limited
350 to such injuries and damage as might accrue to said cattle while they were in possession of this defendant and being transported and carried over this defendant's own line of railroad; that by the terms of said contracts this defendant only agreed and obligated itself to carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time and at the latter place to deliver the cattle to the next connecting carrier, and that this defendant was not to be held or be deemed liable for any loss or damage sustained by plaintiffs in connection with the shipment of said cattle beyond its own line of road, excepting to protect the through rate of freight named in said contracts; that this defendant received said cattle at Strawn, Texas, and did safely and expeditiously carry and transport said cattle from Strawn, Texas, to Paris, Texas, within a reasonable time, and did there deliver he said cattle to the next connecting carrier without loss or damage to plaintiffs, and that this defendant did protect the through rate of freight named in said contracts; that this defendant's line of railroad did not extend beyond Paris, Texas, and that said cattle were not transported and carried over this defendant's line of railroad or any line of railroad owned and operated by this defendant after they were delivered by this defendant to the next connecting carrier at Paris, Texas; that immediately upon the arrival of said cattle at Paris, Texas, they were unloaded from the cars of this defendant into the pens of the next connecting carrier, and said cattle were not thereafter in the possession of or under the control of this defendant; that all the injury, loss and damage sustained by plaintiffs in the shipment and transportation of said cattle occurred while said cattle were in the possession and under the control of and were being carried and transported by the connecting carriers from Paris, Texas, to Tulsa, I. T., the point of destination; that said
351 cattle were shipped from Strawn, Texas, to Paris, Texas, under the direction and at the request and with the consent of plaintiffs, and that plaintiffs executed and signed said contracts willingly and without objection or protest; that at the time said cattle were shipped this defendant did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment of said cattle upon through billing and a through freight rate over the St. Louis & San Francisco Railroad from Ft. Worth, Texas, to Tulsa, I. T.; that at said time this defendant was not authorized and did not have any authority to ship said cattle upon through billing, and upon a through freight rate from Ft. Worth, Texas, to Tulsa, I. T., over the road of the St. Louis & San Francisco Railroad Company; that at said time the St. Louis & San Francisco Railroad Company would not have accepted said cattle at Ft. Worth, Texas, and have carried them over its line of railroad from Ft. Worth, Texas, to Tulsa, I. T., upon through billing and upon a through freight rate; that at the time said cattle were tendered to and received by this defendant for shipment at Strawn, Texas, this defendant offered to bill and ship said cattle

from Strawn, Texas, to Ft. Worth, Texas, upon its local freight rate, or to bill and ship said cattle via Sherman, Texas, or Paris, Texas, upon through billing and upon a through freight rate; whereupon plaintiffs requested and directed that said cattle be shipped via Paris, Texas.'"

Statement.

See statement under second assignment of error.

Authorities.

Fourteenth. Because the court erred in failing to sustain the fourteenth assignment of error of this appellant, which is as follows:

"The court erred in the second paragraph of its findings of fact wherein the court found as a fact 'that the plaintiff- were de-
352 sirous of shipping their said cattle by the shortest and most direct route from Strawn, Texas, to Tulsa, I. T., and that defendant Tucker knew this fact; and find that if defendant Tucker had informed the plaintiff Eastin that he could ship his cattle via Sherman, Texas, and from there to Tulsa, over the St. Louis & San Francisco railroad, he would have shipped them that way, if defendant would have done so; 'because, 1st: Plaintiffs do not plead and allege that the defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 2nd: There is no evidence before the court showing that defendant Tucker was informed or knew that plaintiffs desired their cattle shipped by the shortest and most direct route from Strawn to Tulsa; 3rd: Plaintiffs do not plead and allege that they would have shipped said cattle via Sherman, and from there over the St. Louis & San Francisco railroad if this defendant would have so done; 4th: There is no evidence before the court showing that plaintiffs would have shipped said cattle to Sherman, and from there over the St. Louis & San Francisco railroad to Tulsa if this defendant would have so done; 5th: It appears from the evidence that the defendant Tucker did offer to bill and ship said cattle to Sherman, Texas, and from there over the St. Louis & San Francisco railroad to Tulsa, I. T., but that Plaintiff Eastin directed and requested defendant Tucker to bill and ship said cattle to Paris, Texas.

Statement.

See statement under second assignment of error.

Authorities.

Plaintiff in error represents Thos. D. Sporer, who resides in Jacksboro, Jack County, Texas, is the attorney of record for defendants in error, Eastin & Knox; that West, Chapman & West, who re-
353 side in Ft. Worth, Tarrant County, Texas, are the attorneys of record for the defendant in error, St. Louis & San Francisco Railroad Company.

Wherefore this plaintiff in error prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in Plaintiff in Error's original brief.

H. C. SHROPSHIRE,
Attorney for the Texas & Pacific Railway Company, Plaintiff in Error.

Post-office, Weatherford, Texas.

Endorsed: Mo. No. 1696. No. 1688. The Texas & Pacific Railway Company *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox, Defendants in Error. Application for Rehearing by Plaintiff in Error, T. & P. Ry. Co. Filed in Supreme Court of Texas May 28, 1907. F. T. Connerly Clerk, By J. S. Myrick, Deputy. H. C. Shropshire, Attorney for T. & P. Ry. Co., Plaintiff in Error. 2 Precepts and 2 Certified Copies issued May 30, 1907. Overruled, June 19, 1907.

Order Overruling Motion of T. & P. Ry. Co. for Rehearing.

June 19, 1907.

Mo. No. 1696.

TEXAS & PACIFIC RY. CO.
vs.
EASTIN & KNOX.

From Parker County, Second District.

This day came on to be heard the motion of Plaintiff in Error, Texas & Pacific Railway Company, for a rehearing, and the same having been duly considered it is ordered that said motion
354 be overruled; that the Plaintiff in Error, Texas & Pacific Railway Company and its sureties, Edw. O. Tenison and C. R. Buddy, pay all costs incurred on this motion.

Motion for Rehearing by J. M. Tucker.

Filed May 28, 1907.

In the Supreme Court of the State of Texas.

No. 1688.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

Appeal from the District Court of Parker County, Texas.

Application for Rehearing.

Now comes J. M. Tucker, one of the plaintiffs in error in the above numbered and entitled cause, and moves the court to set aside the judgment heretofore rendered in this cause affirming the judgment of the court below, and to grant him a rehearing, and reverse the judgment of the court below for the following reasons, to-wit:

First. Because the court erred in failing to sustain the first assignment of error of this plaintiff in error, which is as follows:

"The court erred in its conclusions of law, wherein the court concludes: 'The fact that defendant Tucker, agent for the defendant, The Texas & Pacific Railway Company, positively refused to route the cattle as the plaintiffs requested and desired when he could have done so, rendered both the defendants liable for all damages sustained by the cattle, notwithstanding the injury occurred beyond the line of the defendant, Texas & Pacific Railway Company, and the fact that it was stipulated in said shipping contracts that the defendant, Texas & Pacific Railway Company, was not to be responsible for any injury occur-ing after the cattle left its line will not reli-ve it,
355 as said contracts are not binding on the plaintiffs by reason of duress; 'because, 1st: It appears from the evidence that the cattle in controversy were shipped upon two certain live stock contracts which were in writing, and that in the making of said written contracts, and in the shipment of said cattle, this defendant acted and contracted avowedly as the agent of his co-ddefendant, The Texas & Pacific Railway Company, and that at the time of the execution or the making of said contracts for the shipment of said cattle and at the time of the shipment of said cattle, it was well known to plaintiffs that the said Texas & Pacific Railway Company was the principal of this defendant, and that this defendant was the agent of the said Texas & Pacific Railway Company, and that this defendant acted, and was acting in the premises only as the agent of the said Texas & Pacific Railway Company; 2nd: It appears from the evidence that said cattle were billed and shipped via Paris, Texas, under the direction and at the request and with the consent of plaintiffs; 3rd: It appears from the evidence that on or about the 18th. day of April, 1902, plaintiffs' agent, Mr. Chase, called upon this defendant

at the depot of the Texas & Pacific Railway Company at Strawn, Texas, and only stated to this defendant that he wanted him, this defendant, to get or have eighteen cars ready for the shipment of said cattle from Strawn, Texas, to Tulsa, I. T., on the 22nd. day of April, 1902, and for him to order said cars via Ft. Worth, Texas, and the Frisco; that at said time nothing else was said about said cars and that nothing was said by either this defendant or the said Chase about the line of railroad or railroads or the route over which said cattle were to be shipped and transported, or the rate of freight that would be charged for the transportation of said cattle from Strawn, Texas, to Tulsa, I. T., and that at said time this defendant did not agree to furnish said cars for the shipment and transportation
356 of said cattle from Strawn, Texas, to Ft. Worth, Texas, over the line of the Texas & Pacific Railroad and from Ft. Worth, Texas, over the line of the St. Louis & San Francisco Railroad Company; 4th: It appears from the evidence that said contracts only provided for the transportation of said cattle over the line of The Texas & Pacific Railroad from Strawn to Paris, and did not provide for the transportation of said cattle from Strawn to Tulsa, I. T., over the Texas & Pacific to Paris, Texas, and from there on over the St. Louis & San Francisco road to Tulsa, I. T.; that this defendant offered to bill and ship said cattle from Strawn, Texas, over the line of The Texas & Pacific Railway Company to Ft. Worth, Texas, upon a local rate of freight, or to bill and ship said cattle through upon a through rate from Strawn, Texas, over the line of The Texas & Pacific Railway Company, to either Sherman, Texas, or Paris, Texas; and that plaintiffs signed said contracts willingly and without objection or protest; 5th: that at the time of the shipment of said cattle the defendant, The Texas & Pacific Railway Company, did not have any arrangement or agreement with the St. Louis & San Francisco Railroad Company for the shipment and transportation of said cattle upon through rate and billing over the line of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas, to Tulsa, I. T., and that at said time The Texas & Pacific Railway Company was not authorized and did not have authority to bill and ship said cattle upon a through rate over the road of the St. Louis & San Francisco Railroad Company from Ft. Worth, Texas; and at said time the said St. Louis & San Francisco Railroad Company would not have received said cattle at Ft. Worth, Texas, and have carried them from there on over its road to Tulsa, I. T., upon through billing and through rate, and there is no evidence before the court showing that this defendant owed plaintiffs any duty which he failed to perform."

357 Statement.

This plaintiff in error acted and contracted avowedly as the agent of his co-plaintiff in error, The Texas & Pacific Railway Company. (Trans. pp. 1, 2.) Defendants in error so alleged in their pleading.

Authorities.

Hudson *vs.* Compere. 61 S. W. 389.
Cooley on Torts, pp. 140-1.

Second. Because the court erred in failing to sustain the second assignment of error of this plaintiff in error, which is as follows:

"The court erred in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, for the reason set forth in the petition and bond for the removal of this case to said Circuit Court of the United States for the Northern District of Texas filed in this Court by this defendant and his co-defendant, The Texas & Pacific Railway Company, and for the reason as is more fully shown by this defendant's bill of exception No. 1."

Statement.

The Texas & Pacific Railway Company, at the time this suit was filed against it and this plaintiff in error, and now is, a federal corporation. (Trans. pp. 1, 14, 15, and 16.)

All defendants in this case joined in petition for removal of case. (Trans. pp. 14, 15, and 16.)

Petition and bond for removal were filed in due time. (Trans. pp. 1, 14, 17, and 18.)

Plaintiffs sued for $8000.00. (Trans. p. 12.)

Trial court refused to remove case to federal court. (Trans. p. 23.)

It was alleged in petition for removal that this plaintiff in error was fraudulently joined in this case for — purpose of preventing the removal of this case to federal court. (Trans. p. 15.)

358 Defendants in error do not question sufficiency of allegation in petition for removal as to the fraudulent joinder of this plaintiff in error for purpose of preventing removal of this case to federal court. (Trans. p. 1.)

The petition for removal of this case set up at least a *prima facia* case which entitled this case to be removed to the federal court where the issues of fact presented in said petition for removal could be tried. (Trans. p. 15.)

See bill of exception No. 1. (Trans. pp. 23 to 29).

This plaintiff in error excepted to the action of the trial court in refusing to remove this case to the Federal Court. (Trans. p. 23.)

Authorities.

Railway Co. *vs.* Eastin & Knox, 89 S. W. 440, and authorities therein cited.

This plaintiff in error represents that Thos. D. Sporer, who resides in Jacksboro, in Jack County, Texas, is the attorney of record for defendants in error, Eastin & Knox; and that West, Chapman & West, who reside in Ft. Worth, Tarrant County, Texas, are the attorneys of record for the defendants in error St. Louis & San Francisco Railroad Company.

Wherefore this plaintiff in error prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside

and a rehearing granted, and that further proceedings be had herein as prayed for in Plaintiff in Error's original brief.

H. C. SHROPSHIRE,
Attorney for J. M. Tucker, Plaintiff in Error.

Postoffice address, Weatherford, Texas.

359 Endorsed: Mo. No. 1697. No. 1688. The Texas & Pacific Railway Company, *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox, Defendants in Error. Application for Rehearing by Plaintiff in Error, J. M. Tucker. Filed in Supreme Court, May 28, 1907, F. T. Connerly, Clerk. By J. S. Myrick, Deputy. H. C. Shropshire, Attorney for J. M. Tucker, Plaintiff in Error. Precepts (2) and Certified Copies (2). Issued May 30, 1907. Overruled June 19, 1907.

Order Overruling Motion for Rehearing by J. M. Tucker.

June 19, 1907.

Mo. No. 1697.

J. M. TUCKER,
vs.
EASTIN & KNOX.

From Parker County, Second District.

This day came on to be heard the motion of Plaintiff in Error, J. M. Tucker, for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the Plaintiff in Error, J. M. Tucker and his sureties, Edw. O. Tenison, and C. R. Buddy, pay all costs incurred on this motion.

360 *Petition for Writ of Error by the Tex. & Pacific Ry. Co. et al.*

Filed July 13, 1907.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX ET AL., Defendants in Error.

To the Honorable R. R. Gaines, Chief Justice of the Supreme Court of Texas:

Your petitioners, The Texas & Pacific Railway Company, a corporation, and J. M. Tucker, respectfully show that heretofore, to-wit: on the 11th day of November, 1904, there was tried in the Dis-

trict Court of Parker County, Texas, a case in which Eastin & Knox were plaintiffs and your petitioner, and its agent, J. M. Tucker and The St. Louis & San Francisco Railroad Company, were defendants, said suit being styled No. 3985, Eastin & Knox, *vs.* J. M. Tucker *et al.*

The declaration of the plaintiffs in said case was a petition for the recovery of damages by reason of the injury to a lot of cattle in the shipment and transportation thereof over the line of the defendant, The Texas & Pacific Railway Company, and that of the defendant, The St. Louis & San Francisco Railroad Company from Strawn, Texas, to Tulsa, I. T., said damages being laid in the sum of $8,000.00, and the said injury and damage to said cattle being alleged by plaintiffs to have been the result of the failure and refusal of the said defendant, J. M. Tucker, local agent of the defendant, The Texas & Pacific Railway Company, at Strawn, Texas, to route the cattle over the shortest and most direct route from point of origin of shipment to point of dest-nation, as requested by plaintiffs so to do; and the treatment the cattle received while being trans-
361 ported upon the cars, and in feeding pens; and the acts of the said defendant, J. M. Tucker, in routing the cattle over the protest of plaintiffs, over the line of the defendant, The Texas & Pacific Railway Company, from Strawn to Paris, Texas, thence over the line of the defendant, The St. Louis & San Francisco Railroad Company to Tulsa, I. T., point of destination.

Said case was filed in said District Court of Parker County, Texas, by Eastin & Knox, plaintiffs, on the 4th day of February, 1904. Thereafter, on the 1st day of April, 1904, and prior to the time the defendants, The Texas & Pacific Railway Company and J. M. Tucker, were required to make answer to the petition of the said Eastin & Knox, plaintiffs, in said District Court, The Texas & Pacific Railway Company, defendant, joined by its agent and co-defendant, J. M. Tucker, filed in said District Court of Parker County, Texas, its petition and bond for removal of this case to the Circuit Court of the United States for the Northern District of Texas, together with a general denial of the allegations contained in the original petition of plaintiffs, Eastin & Knox, and also a good and sufficient removal bond.

In its petition for removal of this case to said Circuit Court of the United States for the Northern District of Texas, these petitioners alleged that the Texas & Pacific Railway Company was and is a corporation duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate The Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas & Pacific Railroad Company was changed to "The Texas & Pacific Railway Company." That the matter
362 in dispute in this case exceeds, exclusive of interest and cost, the sum or value of Two Thousand Dollars, and that this suit against it is a suit arising under the laws of the United States, and

more especially under the laws of the United States, constituting the charter of this petitioner, and under which it was incorporated; that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874. Also that this suit against it is a civil suit arising under the laws of the United States of which the said Circuit Court of the United States for the Northern District of Texas is given original jurisdiction by Act of Congress approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes,' and the Act of Congress approved August 13, 1888, entitled "An Act to correct the enrollment of an Act appoved March 3, 1887, entitled 'An Act to amend Sections 1, 2, 3, and 10 of an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes,' approved March 3, 1875." Also that the said J. M. Tucker was its local station agent, and acted for it as agent, and not in any other capacity, and was not and is not a proper party to this suit. That plaintiffs do not in their petition state any cause of action against him; that they improperly and wrongfully joined said J. M. Tucker with the Texas & Pacific Railway Company in the case for the sole and only purpose of preventing this petitioner, The Texas & Pacific Railway Company, from removing the case to the Circuit
363 Court of the United States for the Northern District of Texas which said joinder of said J. M. Tucker was done fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas," etc., together with other formal and necessary allegations.

On the 5th day of April, 1904, same being appearance day in said District Court of Parker County, Texas, plaintiffs filed in said Court their first supplemental petition resisting the removal of this cause to said Circuit Court of the United States for the Northern District of Texas, and upon representation and hearing of this petitioner's petition and bond for removal and the supplemental petition of plaintiffs resisting the removal of this case to the Circuit Court of the United States for the Northern District of Texas, the trial judge of said District Court of Parker County, Texas, overruled the petition for the removal of this case to said Circuit Court of the United States for the Northern District of Texas, but approved said removal bond and forced these petitioners, The Texas & Pacific Railway Company and the said J. M. Tucker to prepare for trial in said District Court of Parker County, Texas, to which action of said District Court of Parker County, Texas, petitioners excepted at the time and they each protested against said district court of Parker County, Texas, retain-

ing jurisdiction to further try and determine the rights of the parties in this suit in said District Court of Parker County, Texas.

After said District Court of Parker County, Texas, had denied petitioners the right to remove this case to the said Circuit Court of the United States for the Northern District of Texas, the case was continued for the term, and thereafter petitioners on the 7th day of April, 1904, filed in said District Court of Parker County, Texas, their amended original answer in which it still protested
364 against said District Court of Parker County, Texas, retaining jurisdiction of this case, and made the St. Louis & San Francisco Railroad Company a party defendant to this case and petitioner, The Texas & Pacific Railway Company prayed for judgment in its favor over against said St. Louis & San Francisco Railroad Company in amount equal to whatever amount plaintiffs might recover against it on trial of this case by reason of the negligence of said St. Louis & San Francisco Railroad Company, which said Company appeared and answered. A jury being waived the case was tried before the judge of said District Court of Parker County, Texas, on the 11th day of November, 1904, when judgment was rendered in favor of plaintiffs and against petitioners for the sum of $3600.00, and in favor of petitioner, The Texas & Pacific Railway Company, against the said St. Louis & San Francisco Railroad Company for the sum of $1800.00, from which judgment the said J. M. Tucker, the said St. Louis & San Francisco Railroad Company and The Texas & Pacific Railway Company took an appeal of this case to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Ft. Worth, which Court, upon hearing thereof, upon the 1st day of July, 1905, in its opinion of that date, held the judge of the trial court, said District Court of Parker County, Texas, erred in his ruling in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, and reversed the judgment of the said District Court of Parker County, Texas, and remanded this case to said District Court of Parker County, Texas, for further proceedings in accord with said opinion of said Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Plaintiffs sought and obtained a review of the judgment of said Court of Civil Appeals for the Second Supreme Judicial District of Texas, by writ of error granted by the Supreme Court of the
365 State of Texas, which court, upon hearing thereof, upon the 2nd day of May, 1906, in its opinion of that date, reversed the decision of said Court of Civil Appeals for the Second Supreme Judicial District of Texas, affirmed the judgment of the District Court of Parker County, Texas, and remanded the case to said Court of Civil Appeals for the Second Supreme Judicial District of Texas for further proceedings in accord with the opinion of said Supreme Court of the State of Texas. Said Court of Civil Appeals for the Second Supreme Judicial District of Texas thereafter in obedience to said opinion of said Supreme Court of Texas, adopted the findings of facts and conclusions of law of said District Court of Parker County, Texas, and affirmed the judgment of said District Court of Parker County, Texas.

Petitioners together with the said St. Louis & San Francisco Railroad Company, each sought and obtained a review of the judgment of said Court of Civil Appeals for the Second Supreme Judicial District of Texas, by the Supreme Court of Texas, by writ of error granted by said Supreme Court of Texas, and said Supreme Court of Texas, on the 15th day of May, 1907, rendered its final judgment thereon, affirming the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and affirming the judgment of the Court below, namely, the saitl District Court of Parker County, Texas.

Therefore these petitioners each filed in said Supreme Court of Texas—motion for rehearing, which motion for rehearing, was by said Supreme Court of Texas, duly overruled on the 19th day of June, 1907, and said judgment of said Supreme Court of the State of Texas was, and is a final judgment in the highest court of the State of Texas in which a decision in said suit could or can be had.

Your petitioners further show that upon the trial of said
366 cause in the District Court of Parker County, Texas, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, and in the Supreme Court of the State of Texas at Austin, there were presented to said courts, and each of them certain Federal questions, to-wit:

I.

Whether a suit against a railroad corporation created and organized under an act of Congress, and deriving its corporate powers and existence from Congressional legislation, and its local station agent, who is a citizen of the state of which the plaintiffs are citizens, to establish a joint liability of the defendant for negligence, is one arising under the laws of the United States, and is removable on that ground, from a State to a proper Circuit Court of the United States on a petition therefor by both defendants.

II.

Whether a railroad corporation created and organized under an Act of Congress, and deriving its corporate powers and existence from Congressional legislation, can be deprived of its right to remove a suit brought against it in a State Court to the proper Federal Court because other defendants are joined in said suit, against whom such suit may be maintained without reference to the Federal laws.

III.

Whether a suit brought in a State Court against a railroad corporation created and organized under an act of Congress, and deriving its corporate powers and existence from Congressional legislation, and its local station agent, who is a citizen of the state of which plaintiffs are citizens, and who was joined in said suit fraudulently and for the sole and only purpose of preventing said railroad corporation from removing such suit to the proper Federal Court,
367 to establish a joint liability of the defendants for negligence, is one arising under the laws of the United States, and is removable on that ground on a petition therefor by both defendants.

And your petitioners contended, by petition and bond for the removal of this case to the Circuit Court of the United States for the Northern District of Texas, and in said case, that the filing of its said petition and bond, for the removal of this case, with the clerk of the District Court of Parker County, Texas, did in fact remove this cause to the said Circuit Court of the United States for the Northern District of Texas, and deprived the said District Court of Parker County, Texas, and the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, and the Supreme Court of the State of Texas, at Austin and each of said courts, of jurisdiction and the right and power to further try or hear and determine the rights of the parties in this cause; and that the action of said District Court of Parker County, Texas, in refusing to remove this case to the Circuit Court of the United States for the Northern District of Texas, and in retaining jurisdiction of this cause, and the trial thereof in said District Court of Parker County, Texas, and the opinion and decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, affirming the judgment of the District Court of Parker County, Texas, and the opinion and decision of the Supreme Court of the State of Texas, at Austin, affirming the judgment of the said Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, and the judgment of the District Court of Parker County, Texas, was and is repugnant to and in violation of the laws of the United States, and especially of those acts of Congress of the United States commonly called the "Removal Acts."

368 Your petitioners further show that a Federal question was made in said case, to-wit: as hereinbefore set out, and that said judgment of the said Supreme Court of the State of Texas was repugnant to and in conflict with the laws of the United States and the "Removal Acts" of its Congress aforesaid, and that said judgment of the said Supreme Court of the State of Texas was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered.

Your petitioners further show that a Federal question was made in said case, to-wit, that there was claimed a title, right, privilege and immunity under and by virtue of the laws of the United States, and especially of those acts of Congress of the United States commonly called the "Removal Acts", aforesaid, and there was drawn into question the construction and application of said "Removal Acts", and the decision and judgment of the said Supreme Court of the State of Texas was against the said title, right, privilege and immunity claimed by this petitioner thereunder; and that a decision of said Federal question was necessary to the judgment rendered by said Supreme Court of the State of Texas.

Wherefore, your petitioners present herewith an exemplified transcript of the record of the Supreme Court of Texas in said case and pray that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that citation be directed to the said Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, and to the said St. Louis & San Francisco Railroad Company;

that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate — a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of

369 said Supreme Court of Texas, be reversed.

THE TEXAS & PACIFIC RAILWAY COMPANY.
J. M. TUCKER.
T. J. FREEMAN.
W. L. HALL.
SPOONTS, THOMPSON & BARWISE, AND
H. C. SHROPSHIRE,
Attorneys and of Counsel for Petitioners, The Texas & Pacific Railway Company and J. M. Tucker.

The writ of error as prayed for in the foregoing petition is hereby allowed this 13th. day of July, 1907; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $10,000.

Dated at Austin, Texas, this the 13th. day of July, 1907.

R. R. GAINES,
Chief Justice, Supreme Court of The State of Texas.

Filed in my office this 13th. day of July, 1907.

F. T. CONNERLY,
Clerk, Supreme Court of the State of Texas.

Endorsed: In the Supreme Court of The State of Texas. The Texas & Pacific Railway Company, *et al.*, plaintiffs in error, *vs.* Eastin & Knox, *et al.* Defendants in error. Petition for Writ of Error by the Texas & Pacific Railway Company, *et al.*, plaintiffs in Error. T. J. Freeman, W. L. Hall, Spoonts, Thompson & Barwise, and H. C. Shropshire, Attorneys for Plaintiffs in Error, Texas & Pacific Ry Co. *et al.*. Filed in Supreme Court of Texas July 13, 1907. F. T. Connerly, Clerk.

370 In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX ET AL., Defendants in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Texas & Pacific Railway Company, a corporation, and J. M. Tucker, plaintiffs in error, and Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, and the St. Louis & San Francisco Railroad Company, defendants in error, wherein was drawn in question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Statute, and manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company and J. M. Tucker, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
371 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of August, 1907, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of July in the year of our Lord, 1907.

[The Seal of the U. S. Circuit Court, Western Dist., Texas, Austin.]

D. H. HART,
Clerk of the United States Circuit Court for the Western District of Texas.

Allowed by:
R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

371½ [Endorsed:] In the Supreme Court of the State of Texas. The Texas & Pacific Railway Company *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox *et al.*, Defendants in Error. Writ of Error. A copy of this original writ of error is this day lodged with the clerk for the use of the defendants in error. F. T. Connerly, Clerk of the Supreme Court of the State of Texas. July 13, 1907. Filed in Supreme Court of Texas July 13, 1907. F. T. Connerly, Clerk.

A copy of this original writ of error is this day lodged with the clerk for the use of the defendants in error.

D. H. HART,
Clerk Circuit Court of the United States, Western District of Texas, this July 13, 1907.

372 In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX ET AL., Defendants in Error.

Citation in Error.

United States of America to Eastin & Knox, and the St. Louis & San Francisco Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Texas, wherein the Texas & Pacific Railway Company, a corporation, and J. M. Tucker, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Texas & Pacific Railway Company and J. M. Tucker, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, Chief Justice of the Supreme Court of the State of Texas, this the 13th day of July, in the year of our Lord, One Thousand, Nine Hundred and Seven.

[Seal Supreme Court of the State of Texas.]

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

373 I hereby accept service of the within citation, and acknowledge receipt of copy of the same.
This the 22d day of July, 1907.

THOS. D. SPORER,
For Eastin & Knox, Defendants in Error.
WEST, CHAPMAN & WEST,
Attorneys for St. L. & S. F. R'y Co., Def't in Error.

373½ [Endorsed:] In the Supreme Court of the State of Texas. The Texas & Pacific Ry. Co., *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox *et al.*, Defendants in Error. Citation in Error. (Original.) Filed in Supreme Court of Texas July 13th, 1907. F. T. Connerly, Clerk.

374 *Writ of Error Bond.*

Filed July 13, 1907.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,

vs.

EASTIN & KNOX ET AL., Defendants in Error.

Bond for Writ of Error.

Know all men by these presents: That we, The Texas & Pacific Railway Company, a corporation, and J. M. Tucker as principals and —— —— and —— —— as sureties, are held and firmly bound unto Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, and the St. Louis & San Francisco Railroad Company — corporation, in the sum of Ten Thousand Dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents, yet upon these conditions: that,

Whereas, the above named plaintiffs in error, The Texas & Pacific Railway Company and J. M. Tucker, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Texas;

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error, The Texas & Pacific Railway Company and J. M. Tucker shall prosecute their said writ of error to effect and answer all costs and damage, if they shall fail to make good their plea, then this obligation shall be void; otherwise of full force and effect.

375 Witness our hands and seal this the 12th. day of July, A. D. 1907.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By H. C. SHROPSHIRE,
Its Attorney.

J. M. TUCKER.
EDW. O. TENISON.
C. R. BUDDY.

I hereby approve the foregoing bond and sureties, this the 13th. day of July, 1907.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

THE STATE OF TEXAS, *County of Dallas:*

I, H. H. Williams, Clerk of the District Court in and for Dallas County, do hereby certify that the sureties on the within Bond are in my opinion good and ample security for the amount therein specified and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Dallas, this 12th. day of July, A. D. 1907.

[SEAL.]

H. H. WILLIAMS,
By S. T. JACKSON, *Deputy.*

Endorsed: In the Supreme Court of the State of Texas. The Texas & Pacific Railway Company, *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox, *et al.*, Defendants in Error. Bond on Writ of Error. Filed in Supreme Court of Texas, July 13, 1907. F. T. Connerly, Clerk.

376 *Assignment of Errors.*

Filed July 13, 1907.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX ET AL., Defendants in Error.

Assignment of Errors.

Now comes The Texas & Pacific Railway Company and J. M. Tucker, plaintiffs in error, and respectfully submit that in the record of proceedings, decision, and final judgment of the Supreme Court of the State of Texas, in the above entitled matter, there is manifest error in this, to-wit:

I.

The Supreme Court of the State of Texas erred in adjudging and deciding that a suit filed in a State Court against The Texas & Pacific Railway Company, alleged and shown to be a railroad corporation created and organized under an Act of the Congress of the United States, and deriving its corporate powers and existence from Congressional legislation, and against its local agent, J. M. Tucker, who is a citizen of the State of which the Defendants in Error are citizens, to establish a joint liability of said The Texas & Pacific Railway Company and the said J. M. Tucker for negligence, is not one arising under the laws of the United States, and removable on that ground from a State to the proper Federal Court on a petition therefor, by both the said The Texas & Pacific Railway Company and the said J. M. Tucker. It appearing that said suit was for more than Two Thousand Dollars exclusive of interest and costs.

377 II.

The Supreme Court of the State of Texas erred in adjudging and deciding that a suit filed in a State Court against the Texas & Pacific Railway Company, a railroad corporation created and organized under an Act of the Congress of the United States, and deriving its corporate powers and existence from Congressional legislation, and its local station agent, J. M. Tucker, who is a citizen of the State of which the Defendant- in Error are citizens, and who is fraudulently joined in said suit, as defendant, for the sole and only purpose of preventing the said The Texas & Pacific Railway Company from removing said suit from the State to the proper Federal Court, to establish a joint liability of said The Texas & Pacific Railway Company and the said J. M. Tucker for negligence, is not one arising under the laws of the United States, and removable on that ground from a State to the Proper Federal Court, on a petition therefor, by both the said The Texas & Pacific Railway Company and the said J. M. Tucker.

III.

The allegations in the petition filed in the District Court of Parker County, Texas, by the Texas & Pacific Railway Company and J. M. Tucker, plaintiffs in error, for the removal of this cause to the Circuit Court of the United States for the Northern District of Texas, showed that Eastin & Knox, defendants in error, joined the said J. M. Tucker in this cause, as defendant, for the sole and only purpose of preventing the Texas & Pacific Railway Company, plaintiff in error, from removing this case to the Circuit Court of the United States for the Northern District of Texas; and it therefore followed that upon the filing of said removal petition and bond in the said

378 District Court of Parker County, Texas, the jurisdiction and power and right of said Court to further hear and determine the rights of the parties to this cause, ceased; and it then became the duty of the judge of said District Court of Parker County, Texas, to order a removal of this cause to the said Circuit Court of the United States for the Northern District of Texas, where plaintiffs in error, the Texas & Pacific Railway Company and J. M. Tucker could have the issues of fact raised in their petition for removal as to the question of the fraudulent joinder of the said J. M. Tucker as defendant in this case, as aforesaid, properly tried; and it therefore further followed that the Supreme Court of the State of Texas erred in adjudging and deciding that the District Court of Parker County, Texas, did not err in refusing to direct a removal of this cause to the Circuit Court of the United States for the Northern District of Texas.

IV.

Plaintiff in Error says that said judgment of said Supreme Court of the State of Texas is repugnant to and in conflict with the laws of the United States, and especially those several acts of the Congress of the United States commonly called the "removal acts," and of Sec-

tions 1 and 2 and 3 of that one approved March 3, 1887. As corrected by the Act of August 13, 1888, entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States and regulate the removal of causes from the State Courts and — other purposes."

V.

It appeared that plaintiff in error, The Texas & Pacific Railway Company, was a corporation created by virtue of the laws of the United States, and that it instituted and filed proper proceedings for removal of this cause to the Circuit Court of the United States for the Northern District of Texas, and in which proceedings, plaintiff in error, J. M. Tucker joined. This action on the part of plain-
379 tiffs in error presented a case to the District Court of Parker County, Texas, where a right, privilege and immunity was set up and claimed under and by virtue of the laws of the United States. It says that the Supreme Court of Texas erred in denying the plaintiffs in error this right, privilege and immunity.

VI.

It says that the Supreme Court of Texas in this cause erred in not directing a reversal of the judgment of the District Court and Court of Civil Appeals, and with direction to the said District Court of Parker County, Texas, that it should upon another hearing order that this cause be removed to the Circuit Court of the United States for the Northern District of Texas in accordance with the petition and prayer for removal filed by plaintiffs in error.

VII.

The interpretation placed on the Act of March 3, 1887, as corrected by the Act of August 13, 1888, entitled "An Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from the State Courts and — other purposes," by the said Supreme Court of Texas, was contrary to, in violation of and in contravention of the Statutes and the laws of the United States providing for removal of causes from the *United States* to the Circuit Court of the United States.

T. J. FREEMAN,
W. L. HALL,
SPOONTS, THOMPSON, & BARWISE, AND
H. C. SHROPSHIRE,
Attorneys for Plaintiffs in Error, The Texas & Pacific Railway Company and J. M. Tucker.

Now comes The Texas & Pacific Railway Company and
380 J. M. Tucker, plaintiffs in error, and pray that the judgment and decision of the said Supreme Court of the State of Texas, aforesaid, be reversed, annulled, and altogether held for nought, and

that they may be restored all things which they have lost by the action and because of the said judgment and decision.

T. J. FREEMAN,
W. L. HALL,
SPOONTS, THOMPSON & BARWISE, AND
H. C. SHROPSHIRE,
Attorneys for Plaintiffs in Error, The Texas & Pacific Railway Company and J. M. Tucker.

Endorsed: In the Supreme Court of the State of Texas. The Texas & Pacific Ry. Co., *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox, *et al.*, defendants in Error. Assignment of errors. Original. Filed in Supreme Court of Texas, July 13, 1907. F. T. Connerly, Clerk.

Order Extending Time Within Which to File Record in Supreme Court of the United States.

Filed July 13, 1907.

In the Supreme Court of the State of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
vs.
EASTIN & KNOX, Defendants in Error.

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Supreme Court of the United States pursuant to the writ of error herein sued out, is extended until the 10th day of September, 1907.

R. R. GAINES,
Chief Justice Supreme Court of Texas.

Austin, Texas, July 13, 1907.

381 Endorsed: In the Supreme Court of the State of Texas. The Texas & Pacific Railway Company, *et al.*, Plaintiffs in Error, *vs.* Eastin & Knox, *et al.*, Defendants in Error. Order Extending Time to file Record. Filed in Supreme Court of Texas, July 13, 1907. F. T. Connerly, Clerk.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing Three Hundred and Eighty pages,—except pages 370 and 371, and pages 372 and 373,—contain true and correct copy of a transcript of the record of all the proceedings had in the District Court of Parker County, Texas, in the Court of Civil Appeals of the Second Supreme Judicial District and the Supreme Court of the State of Texas, as the same appear of record and on file in this office in cause No. 1688, The Texas & Pa-

cific Railway Company, *Et Al*, Plaintiffs in Error, *vs.* Eastin & Knox, Defendants in Error. I further certify that the pages herein numbered 370 and 371 is the original writ of error, of which a copy has been lodged and is now on file in this office, and that the pages herein numbered 372 and 373 is the original citation in error and acceptance of service, of which a copy is now on file in this office.

In testimony whereof, I have hereunto affixed my signature, with the seal of the Supreme Court of Texas, at the city of Austin, this the 17th day of August, A. D. 1907.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY, *Clerk*.

Endorsed on cover. File No. 20,852. Texas supreme court Term No. 449. The Texas & Pacific Railway Company and J. M. Tucker, plaintiffs in error, *vs.* Eastin & Knox, a firm composed of S. W. Eastin and D. L. Knox, and The St. Louis & San Francisco Railroad Company. Filed September 10th, 1907. File No. 20,852.

7

Office Supreme Court, U. S.
FILED.
APR 22 1909
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 177.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER,

Plaintiffs in Error,

vs.

EASTEN & KNOX, a firm composed of S. W. Eastin and D. L. Knox, and THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,

Defendants in Error.

Reply Brief of Plaintiffs in Error.

JOHN F. DILLON,
RUSH TAGGART,
W. L. HALL,
Attorneys for Plaintiffs in Error.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER,
Plaintiffs in Error,

vs.

EASTIN & KNOX, a firm composed of S. W. Eastin and D. L. Knox, and the ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Defendants in Error.

October Term, 1908.
No. 177

Statement.

In the brief filed herein on behalf of Eastin & Knox, defendants in error, the point is made that after the State Court refused to recognize the removal of this case, the Texas and Pacific Railway Company, in the answer which it filed suggesting that the St. Louis and San Francisco Railroad Company was the company upon whose lines the cattle were injured, and asked that it should be made a party to the litigation, waived the right to remove this cause. A fair understanding of the facts and dates, in the light of the record, will completely answer this contention.

The petition and bond for removal of the Texas and Pacific Railway Company in this cause were filed April 1st, 1904 (Record, pp. 9–12). The supplemental petition of the defendants in error Eastin and Knox, resisting the removal of the case was filed in the State Court on the 5th of April, 1904 (Record, pp. 13–15). The judgment of the State Court refusing the petition to remove the case was entered April 5th, 1904 (Record, p. 15). A bill of exceptions to the refusal of the Court to remove the case was duly prepared, and was approved on the 5th day of April, 1904, and duly filed on the 5th day of May, 1904 (Record, pp. 16–20). The first amended

original answer of the Texas and Pacific Railway Company was filed by leave of Court on the 7th day of May, 1904 (Record, p. 20). The second amended original answer was filed by leave of Court on the 9th of November, 1904 (Record, pp. 21–29). Both of these answers of the Texas and Pacific Railway Company protested against the right of the State Court to hear and determine the cause. The third paragraph of the second amended original answer filed November 9th, 1904, is the paragraph upon which the defendants in error rely to establish their claim of a waiver of the right to removal of that cause to the Federal Court (Record, pp. 26–29).

ARGUMENT

Upon the filing of the petition and bond for removal in this cause the State Court lost jurisdiction of the case. The subsequent defence in that court by the Texas & Pacific Railway Company in no way affected the result of the filing of its petition and bond for removal.

The petition and bond for removal in this case were in proper form and complied with the provisions of the Act of Congress respecting the removal of this case from the District Court of Parker County, Texas, to the Circuit Court of the United States for the Northern District of Texas (Matter of Dunn, 212 U. S., 374). The State Court, therefore, lost jurisdiction of said cause immediately upon the filing of said petition and bond in such proper form, regardless of the action of the State Court, or of its determination upon the questions presented by the petition and bond for removal.

Powers vs. Chesapeake & Ohio Railway Co., 169 U. S., 92.
Steamship Co. vs. Tugman, 106 U. S., 118.
Railroad Co. vs. Koontz, 104 U. S., 5.
Railroad Co. vs. Mississippi, 102 *id.*, 135.
Kern vs. Huidekoper, 103 U. S., 485.
Insurance Co. vs. Dunn, 19th Wallace, 214.

The same authorities also establish the clear proposition that after such filing of petition and bond in proper form if the State Court persists in claiming and exercising jurisdiction, the defendant loses nothing by remaining in that court, and defending upon the merits. The law upon that subject is lucidly and fully stated by Mr. Justice HARLAN, in the following paragraphs from the opinion in the case of Steamship Company vs. Tugman:

"The only remaining question which need be considered is whether the jurisdiction of the State court was, in any form, restored, after the company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond—the suit being removable under the statute,—the jurisdiction of the State court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the State court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the State court, to determine.

"Nor was the jurisdiction of the State court restored when the company subsequently consented to the order requiring the issues to be heard and determined by a referee selected by the parties, or when it appeared and contested the case, as well before the referee as in the State courts, up to final judgment. The right of the company to have a trial in the Circuit Court of the United States became fixed upon the filing of the petition and bond. But the inferior State court having ruled that the right of removal did not exist, and that it had jurisdiction to proceed, the company was not bound to desert the case, and leave the opposite party to take judgment by default. It was at liberty, its right to removal being ignored by the State court to make defense in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing, in the slightest degree, its right to a trial in the court to which the action had been transferred, or without affecting,

to any extent, the authority of the latter court to proceed. The consent, by the company, to a trial by referee was nothing more than an expression of its preference—being compelled to make defense in the State court—for that one of the several modes of trial permitted by the laws of the State. It is true that when the cause was taken up by the referee, as well as when heard in the Supreme Court of the State and in the Court of Appeals, the company protested that the Circuit Court of the United States alone had jurisdiction after the petition and bond for removal were filed. But no such protests were necessary, and they added nothing whatever to the legal strength of its position. When the State court adjudged that it had authority to proceed, the company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to maintain the right of removal, to protest at subsequent stages of the trial against its exercise of jurisdiction. Indeed, such a course would scarcely have been respectful to the State court, after its ruling upon the point of jurisdiction had been made.

What we have said upon this subject is fully sustained by our former decisions, particularly Railroad Company v. Koontz, 104 U. S., 5; Railroad Company v. Mississippi, 102 *id.*, 135; Kern v. Huidekoper, 103 *id.*, 485; and Insurance Company v. Dunn, 19 Wall., 214.

In this case the company protested and preserved its objection, although according to the decisions of this Court such protest was unnecessary. Its answer was merely defensive, and presented only defenses open to it in accordance with the modes of trial prescribed by the statutes and practice of Texas. If, as the foregoing cases decide, the filing of the petition and bond ousts the jurisdiction of the State court over the cause, and the jurisdiction of the Circuit Court of the United States immediately attaches, and any order made in the State court thereafter was *coram non judice*, then it is difficult to understand how any step taken thereafter by the Texas and Pacific Railway Company in the State court to defend itself during the progress of the cause therein could be considered as a waiver of the right, which it had fully asserted by the filing of its petition and bond for removal. It is equally difficult to understand how any such course of action taken by the Texas and Pacific Railway Company in the State Court could oust the jurisdiction of the United States Circuit Court over the cause which had attached upon the filing of its petition and bond for removal. If in the case of Steam-

ship Company vs. Tugman, the consent to an order of reference in no way restored the jurisdiction of the State Court over the cause, so, likewise, it would follow that any thing suggested in the answer of the Texas and Pacific Railway Company as to the liability of the St. Louis and San Francisco Railroad Company, would not in any way restore the jurisdiction of the State Court, which had been terminated by the filing of its petition and bond for removal.

The difficulty with the position taken by the defendants in error, is that as shown by the record, on the 1st day of April, 1904, by the filing of its petition and bond for removal, the Texas and Pacific Railway Company terminated absolutely and entirely the jurisdiction of the State Court over this cause, and the United States Circuit Court for the Northern District of Texas was thereupon vested with jurisdiction over it. Therefore, all subsequent proceedings in the State Court were void, notwithstanding the determination of the State Court, that it was still vested with jurisdiction and entitled to proceed in the cause and take cognizance of it, and it was therefore impossible that by any steps taken in the filing of an answer on the 9th of November by the Texas and Pacific Railway Company, the United States Circuit Court should lose this jurisdiction over the case, or the State Court have restored to it the jurisdiction which it had lost on the previous 1st of April. The case would be entirely different under the authorities if the answer in question had preceded the filing of the petition and bond for removal, for then, there would have been such a submission to the jurisdiction of the State Court as would have presented a very different question for the consideration of this court.

Respectfully,

JOHN F. DILLON,
RUSH TAGGART,
W. L. HALL,
Attorneys for Plaintiffs in Error.

APR 6 1900
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 177.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER,

Plaintiffs in Error,

vs.

EASTIN & KNOX, a firm composed of S. W. Eastin and D. L. Knox, and THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,

Defendants in Error.

BRIEF OF THE PLAINTIFFS IN ERROR.

JOHN F. DILLON,
RUSH TAGGART,
W. L. HALL,
Attorneys for Texas and Pacific Railway Company.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 177.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER,
Plaintiffs in Error,

vs.

EASTIN AND KNOX, a firm composed of S. W. Eastin and D. L. Knox, and the ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

This suit was instituted by S. W. Eastin and D. L. Knox, under the firm name of Eastin & Knox, in the District court of Parker county, in the state of Texas. The original petition was filed February 4th, 1904, against the appellants herein. The plaintiffs alleged that they lived in Jack county, Texas; that the defendant, Tucker, was a resident of Palo Pinto county, Texas; and that the Texas and Pacific Railway Company was a corporation incorporated under and by virtue of an Act of Congress, with an office in Palo Pinto county, and the appellant, Tucker, was the agent of the appellant,

railway company, at Strawn, Palo Pinto county. Plaintiffs further alleged that they were engaged in the cattle business ; that on the 22d day of April, 1902, the Texas and Pacific Railway Company operated its line of road through Palo Pinto county, and other counties in the state of Texas, from Strawn, Texas, to Ft. Worth, Texas ; that J. M. Tucker was its agent at Strawn, attending to and representing the said railway company in the transportation of live stock, etc. The petition further charged that a few days prior to the 22d day of April, 1902, the petitioners notified Tucker as the agent of the Texas and Pacific Railway Company that they desired to ship the cattle referred to in the record of this case, to Tulsa, Indian Territory, and wanted cars ready at said time for that purpose. They further charged that prior to that time they had made arrangements with the St. Louis and San Francisco Railway Company, and when the cattle were shipped from Strawn to Ft. Worth, they were then to be carried over the Red River and Southern Railway Company and St. Louis and San Francisco Railway Company to Tulsa, which would be the shortest route from Strawn to Tulsa.

That they did deliver, on the 22d day of April, 1902, to J. M. Tucker one of the appellants, who was the agent of the Texas and Pacific Railway Company at Strawn, Texas, six hundred and fifty head of stock cattle and ninety-seven calves, of the value of $12,880.00, to be shipped over the most expeditious route to Tulsa, Indian Territory, that Tucker accepted the cattle for that purpose. When the cattle were about loaded, the agent of the shippers was notified, and requested by the said Tucker (the agent of the carriers), to sign a bill of lading or live stock contract which routed the cattle over appellant's line to Paris, Texas, and from there over the St. Louis and San Francisco Railway Company to Monet, Missouri, and from Monet to Tulsa, Indian Territory. It is charged that the shippers' agent objected to signing the bill of lading, and insisted on the bill of lading showing the route over Appellant's line to Ft. Worth, Texas, or to Sherman, Texas, the point of connection with the St. Louis and San Francisco Railway Company, and Tucker refused to change the Billing.

It was further charged that the cattle were stock cattle and at that season were not in good condition, and hence could not stand a long haul. That the plaintiffs' agent signed the bill of lading or live stock contract under protest and duress; that the said agent insisted on billing the cattle

over the Texas and Pacific Railway Company to Ft. Worth, Texas, thence over the Red River and Southern Railway Company to where it connects with the St. Louis and San Francisco Railway Company, and which connected with the Red River and Southern Railway Company at the northern boundary line of the State of Texas, and over the St. Louis and San Francisco Railway Company, and that this was the shortest route to Tulsa, Indian Territory. That the route the cattle were billed was 289.9 miles longer than the route over which the plaintiffs desired the cattle to go. The plaintiffs charged that the agent, Tucker, was following some secret instructions from the appellant, Texas and Pacific Railway Company; that the cattle should have been carried to their destination in fifteen hours shorter time by the direct route than by the route shipped; that by reason of so routing the cattle, they had to be unloaded at Paris, Texas, and loaded in the cars of the St. Louis and San Francisco Railway Company; that the pens at Paris were muddy and in bad condition; that the cattle were bogged and became weakened by the mud, and could not eat on account of the muddy pens; that plaintiffs incurred the expense of feeding them; that the cattle were detained at Cators, a station before reaching Tulsa, fifteen hours, without food and water, and while being delivered were switched and bumped around, which caused some of them to die and weakened others; that by reason of their bad condition they had to be held at Tulsa for sometime before they could be taken to the ranch; that forty head of them died; and that nearly all of the cows lost their calves by reason of rough treatment.

The appellant, Texas and Pacific Railway Company, before the time for answer in the state court, joined by the appellant, Tucker, filed a petition for removal (R., 9). At the time of presenting the petition for removal, it also presented a bond for removal, which was in all things sufficient. The plaintiffs filed a supplemental petition resisting the application to remove the cause (R., 13). The trial court on April 5th, 1904, overruled the application of the appellants to remove the cause, retaining the case in the state court for trial (R., 15). To which ruling of the court, the appellants herein duly excepted. Thereafter on the 7th day of April, 1904, the appellants denying the court's right to proceed further in the cause and protesting against the action of the state court in proceeding further, as the case was duly removed, filed their first amended original answer, in which said amended

answer the appellants asked that the cause be continued, and that the St. Louis and San Francisco Railway Company be made a party defendant to the suit (R., 20). Thereafter on or about the 9th day of November, 1904, the said St. Louis and San Francisco Railway Company having been duly served with process herein, and being properly before the court, the appellants herein filed their second amended original answer, in which they set out the facts concerning the shipments, and asked that in the event judgment was rendered against the appellants, they have judgment over against the St. Louis and San Francisco Railway Company (R., 21 to 29). The cause was tried upon the original petition of the appellees, Eastin & Knox, and the second amended original answer and first supplemental answer of the appellants (the latter of which will be found on page 42 of the record), and the first amended original answer of the St. Louis and San Francisco Railway Company (R., 39). A jury was waived and the cause was tried before the court, and resulted in a judgment in favor of Eastin & Knox against the appellants, the Texas and Pacific Railway Company and J. M. Tucker, its agent, for the sum of Three thousand and six hundred dollars, and in favor of the Texas and Pacific Railway Company and the defendant, Tucker, on their plea against the St. Louis and San Francisco Railway Company for the sum of Eighteen hundred dollars (R., 85, 86). From this judgment, the said Tucker, the St. Louis and San Francisco Railway Company and Texas and Pacific Railway Company appealed to the court of civil appeals for the second judicial district of Texas (R., 104). On the first day of July, 1905, said court of civil appeals for the second judicial district, sitting at Ft. Worth, handed down its opinion, holding that the trial court erred in overruling the application for removal to the circuit court of the United States and in entertaining jurisdiction of the cause and reversed and remanded the case (R., 130-134). The plaintiffs thereupon filed a motion for a rehearing (R—134). Which motion for a rehearing was overruled on October 21st, 1905 (R—139). Plaintiffs thereupon applied to the Supreme court of the State of Texas for a writ of error, which application was, on the 7th day of December, 1905, dismissed for want of jurisdiction (R—148). Whereupon the plaintiffs made a motion for a rehearing in said court (R—149). On February 15th, 1906, the Supreme court of Texas granted the motion for a rehearing, and the application for a writ of error, and thereafter, on the 2d day of

May, 1906, the Supreme court of Texas handed down its opinion, reversing the judgment of the court of civil appeals, holding the case was not removable, and the cause was remanded to that court for a decision of other questions presented by the appeal (R., 153-156). Thereafter, on the 16th day of June, 1906, the said court of civil appeals affirmed the judgment of the district court (R—157). On the 30th day of June, 1906, the Texas and Pacific Railway Company, joined by J. M. Tucker, made a motion for a rehearing, contending there was error committed by the court, and which was, on October 13th, 1906, by the court overruled (R—166). Thereafter, on the 10th day of November, 1906, said Texas and Pacific Railway Company, *et al.*, applied to the Supreme court of the state of Texas for a writ of error (R—170), and on the 20th day of March, 1907, an order was entered by the Supreme court of Texas granting the defendants' application for a writ of error (R—207). Thereafter, and on the 15th day of May, 1907, said Supreme court of Texas handed down its opinion affirming the judgment of the court of civil appeals (R—221). On May 28th, 1907, an application was made for a rehearing in said court (R—226). The motion for a rehearing was overruled in said court on the 19th day of June, 1907 (R., 238). This being the highest court to which this cause could be taken, the Texas and Pacific Railway Co. has sued out its writ of error to this court (R., 242-248).

Assignments of Error.

I.

The Supreme Court of Texas erred in adjudging and deciding that a suit filed in a state court against The Texas & Pacific Railway Company, alleged and shown to be a railroad corporation created and organized under an Act of Congress of the United States, and deriving its corporate powers and existence from Congressional legislation, and against its local agent, J. M. Tucker, who is a citizen of the state of which the defendants in error are citizens, to establish a joint liability of the said The Texas & Pacific Railway Company and the said J. M. Tucker for negligence, is not one arising under the laws of the United States, and removable on that ground from a state to the proper federal court on a petition therefor, by both the said The Texas & Pacific Railway Company and the said J. M. Tucker. It appearing that said suit was for more than two thousand dollars, exclusive of interest and costs (R., 252).

II.

The Supreme Court of the State of Texas erred in adjudging and deciding that a suit filed in a State court against the Texas & Pacific Railway Company, a railroad corporation created and organized under an Act of Congress of the United States, and deriving its corporate powers and existence from Congressional legislation, and its local station agent, J. M. Tucker, who is a citizen of the state of which the defendants in error are citizens, and who is fraudulently joined in said suit, as defendant, for the sole and only purpose of preventing the said The Texas & Pacific Railway Company from removing said suit from the state to the proper federal court, to establish a joint liability of said The Texas & Pacific Railway Company and the said J. M. Tucker, for negligence, is not one arising under the laws of the United States, and removable on that ground from a state to the proper federal court on a petition therefor, by both the said The Texas & Pacific Railway Company and the said J. M. Tucker (R., 253).

III.

The allegations in the petition filed in the district court of Parker county, Texas, by The Texas and Pacific Railway Company and J. M. Tucker, plaintiffs in error, for the removal of this cause to the circuit court of the United States for the Northern district of Texas, showed that Eastin and Knox, defendants in error, joined the said J. M. Tucker in this cause, as defendant, for the sole and only purpose of preventing The Texas and Pacific Railway Company, plaintiff in error, from removing this case to the circuit court of the United States for the Northern district of Texas; and it therefore followed, that upon the filing of said petition and bond in the said district court of Parker county, Texas, the jurisdiction and power and right of said court to further hear and determine the rights of the parties to this cause, ceased; and it then became the duty of the judge of said district court of Parker county, Texas, to order a removal of this cause to the said circuit court of the United States for the Northern district of Texas, where plaintiffs in error, The Texas and Pacific Railway Company and J. M. Tucker could have the issues of fact raised in their petition for removal, as to the question of fraudulent joinder of the said J. M. Tucker, as defendant in this case, as aforesaid, properly tried; and it therefore further followed, that the supreme court of the State of Texas erred in adjudging and deciding that the district court of Parker county, Texas, did not err in refusing to direct a removal of this cause to the circuit court of the United States for the Northern district of Texas? (R., 253).

IV.

Plaintiff in error says that said judgment of said supreme court of the State of Texas is repugnant to and in conflict with the laws of the United States, and especially those several Acts of the Congress of the United States commonly called the "removal Acts," and of Sections 1 and 2 and 3 of that one approved March 3, 1887, as corrected by the Act of August 13, 1888, entitled "An Act to determine the jurisdiction of the circuit courts of the United States and regulate the removal of causes from the State courts and—other purposes" (R., 254).

V.

It appeared that plaintiff in error, the Texas & Pacific Railway Company, was a corporation created by virtue of the laws of the United States, and that it instituted and filed proper proceedings for removal of this cause to the circuit court of the United States for the Northern District of Texas, and in which proceedings plaintiff in error, J. M. Tucker, joined. This action on the part of the plaintiffs in error presented a case to the district court of Parker county, Texas, where a right, privilege and immunity was set up and claimed under and by virtue of the laws of the United States. It says that the supreme court of Texas erred in denying the plaintiffs in error this right, privilege and immunity (R., 255).

VI.

It says that the supreme court of Texas in this case erred in not directing a reversal of the judgment of the district court and court of civil appeals, and with direction to the said district court of Parker county, Texas, that it should, upon another hearing, order that this cause be removed to the circuit court of the United States for the Northern district of Texas, in accordance with the petition and prayer for removal filed by plaintiffs in error (R., 254).

VII.

The interpretation placed on the Act of March 3, 1887, as corrected by the Act of August 13, 1888, entitled "An Act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of the causes from the state courts and—other purposes," by the said supreme court of Texas, was contrary to, in violation of and in contravention of the Statutes and the laws of the United States providing for removal of causes from a state court to the circuit courts of the United States (R., 254).

ARGUMENT.

The Texas and Pacific Railway Company being a corporation chartered under an Act of Congress, when sued alone in the state court for an amount exceeding two thousand dollars, exclusive of interest and costs, has the right to remove the cause to the federal court, and when sued with a local defendant to establish a joint liability of all defendants it is a suit arising under the Constitution and Laws of the United States, and if all defendants join in the application to remove, the cause should be removed to the United States Court.

This suit was originally commenced against the Texas and Pacific Railway Company and J. M. Tucker, its agent, to establish a joint liability. Before the time for answering, a petition and bond for removal were filed by the Texas and Pacific Railway Company, the petition being joined in by said Tucker (R., 9-12). The trial court refused to transfer the cause to the federal court, holding the Texas and Pacific Railway Company could not remove the cause when a local defendant was joined in the suit (R., 15). The decision of the trial court was sustained by the court of civil appeals and by the supreme court of Texas in its final judgment, this being the court of last resort in Texas in which said suit could be heard. In this the supreme court erred, as the joinder of a resident defendant, as a party to a suit, with a corporation chartered by an Act of Congress, does not take from, or deprive said corporation of its right to remove.

Authorities.

Charter of Texas & Pacific Railway Company, 16 Statutes at Large, page 573; Act of Congress of March 3rd, 1875, chapter 137, amended by Acts of 1887 and 1888, sections 1 and 2 of said Act; Osborne vs. U. S. Bank, 9 Wheaton, 738; Smith vs. Union Pacific Railway Company Second Dillon, 278; Pacific Removal cases, 115 U. S., 200-222; Texas & Pacific Railway Company vs. Cody, 166 U. S., 606; *In re* application by Mary Dunn, *et al.*, for Mandamus, against Edward R. Meek, U. S., (decided Feb. 23, 1909).

These cases, we submit, are conclusive upon the question that the Texas & Pacific Railway Company had the right to remove this cause from the state court to the federal court, even though joined with a local defendant, the local defendant having joined in the application to remove. In the last case cited this court at the present term carefully considered and decided the precise question presented upon this record.

From a careful consideration of the Act of 1887, it will be observed that suits which can be removed from a state to a federal court, under the Act, are divided into two general heads:

First. Those arising under the constitution, laws or treaties of the United States.

Second. Those which involve a controversy between citizens of different states.

The first paragraph of section 2, of this Act, reads as follows:

"That any suit of a civil nature at law or in equity arising under the Constitution of the United States or treaties made or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit courts of the United States for the proper district."

The second paragraph of said section 2 reads as follows:

Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state."

The federal circuit and district courts and this court have repeatedly decided, that the term "defendant or defendants" in the first clause of section 2 of the Act to Remove, on the ground of a federal question, means that all of the defendants must join in the application to remove, and in the second clause of section 2, that all of the defendants must be non-residents.

The supreme court of Texas in its opinion in this case, from which this writ of error is perfected, holds directly contrary to the holdings of the federal circuit courts and this court. If there is any limitation at all in the first paragraph of section 2 of the Removal Act of 1887 as amended by the Act of 1888, it is a limitation

imposed by the words, "defendant or defendants therein" and this court having construed the identical words to mean that all of the defendants should join in the application to remove, and the defendants all having joined in the application to remove in this case, the question is no longer a controverted one (See Texas & Pacific Railway Co. vs. Young, 27 S. W., 145; Mayor *et al.* vs. Independent Steamboat Co. *et al.*, 21 Fed. Rep., 593; C. R. I. & P. Ry Co. vs. Martin, 178 U. S., 245; *In re* application by Mary Dunn *et al.*, for Mandamus -------U. S. -------- (decided Feb. 23d, 1909, and cases cited).

We therefore submit in view of the fact that the proceedings leading up to the removal were regular and in due form, and all of the defendants joined therein, that a federal question existed, and was involved. The case was one which should have been removed, and the state court erred in holding it was not removable because a local defendant was joined in the suit, and that too regardless of the fact that the local defendant joined in the application to remove.

SECOND.

Where the facts presented in a petition for removal, show a cause of action properly removable from a State to a Federal Court, the State Court must take the facts as stated in the record, and petition, and has no jurisdiction to pass upon any such questions. The right to pass upon the issues of fact made by the petition for removal is one for the Federal Court, it having the exclusive province of passing upon such questions of fact.

The record in this case discloses the fact that the petition for removal was sworn to and duly filed. It specifically stated that the defendant Tucker was improperly and fraudulently joined as a defendant for the purpose of defeating the right of the Texas and Pacific Railway Company to remove the case and that this was a fraud upon the jurisdiction of the United States District Court for the Northern District of Texas (See printed record, pages 9-10).

The authorities in support of this proposition are numerous and conclusive, but we cite the following :

Black's Dillon on Removal of Causes, Section 191 ; Kounts vs. B. & O. Ry., 104 U. S., 5 ; Stone vs. South Carolina, 117 U. S., 430 ; Burlington Ry. Co. vs. Dunn, 122 U. S., 513 ; Daugherty vs. K. C. & Ft. S. Ry., 138 U. S., 298.

The petition for removal being sworn to, and alleging the fraudulent joinder, the federal court alone had jurisdiction to determine this issue. So far as the state court was concerned, it was compelled to take the statement of facts as true ; it was without jurisdiction to act upon or determine the same, this right being solely vested in the federal court. The state court ignoring this well-settled rule of procedure, and retaining the cause upon its docket, committed error.

THIRD.

The rulings and final judgment in the state courts of Texas were erroneous, and for the reasons assigned its judgment should be reversed.

Respectfully submitted,

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Attorneys for plaintiffs in error

No. 177.

APR 20 1909
JAMES H. McKENNEY,

NO. 20,852

Supreme Court of the United States.

OCTOBER TERM, 1907.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER, Plantiffs in Error,

Vs.

EASTIN & KNOX, a firm composed of S. W. EASTIN and D. L. KNOX, and THE ST. LOUIS and SAN FRANCISCO RAILROAD COMPANY, Defendants in error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR DEFENDANTS IN ERROR, EASTIN & KNOX

THOS. D. SPORER,
ATTORNEY FOR DEF'TS IN ERROR.

H. C. McCLURE,
OF COUNSEL.

JACKSBORO GAZETTE

NO. 20,852

Supreme Court of the United States.

OCTOBER TERM, 1907.

No 449.

THE TEXAS AND PACIFIC RAILWAY COMPANY and J. M. TUCKER, Plantiffs in Error,

Vs.

EASTIN & KNOX, a firm composed of S. W. EASTIN and D. L. KNOX, and THE ST. LOUIS and SAN FRANCISCO RAILROAD COMPANY, Defendants in error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR DEFENDANTS IN ERROR, EASTIN & KNOX

Statement of the Nature and Result of the Suit.

Defendants in Error, Eastin & Knox, sued the Plaintiffs in Error, The Texas & Pacific Railway Company and J. M. Tucker, its agent at Strawn, Texas, for wrongfully and willfully billing, routing and shipping 712 head of cows and calves, or 18 cars, from Strawn, Texas, via

Paris, Texas, and Monett, Mo., to Tulsa, I. T., a distance of 678 miles, instead of sending them to Fort Worth or Sherman, Texas, and then delivering them to the railroads composing the "Frisco System", as requested by the Defendants in Error and which they vainly tried to get them to do. The distance to Tulsa from Strawn, via Ft. Worth and Sherman, over the Frisco, was only 392 miles; even over the T. & P. line via Sherman; and thence over the Frisco to Tulsa was only 392 miles; and had these cattle been billed, routed and shipped via either of the two latter routes they would only have traveled 392 miles. As it was, they were billed and routed, and did travel, 286 miles more than they should, caused by the willful, unreasonable and unlawful, action of the Plaintiffs in error in the premises.

(Hereafter when the Texas & Pacific Railway Co. is referred to it will for convenience be called the T. & P. Co.)

Defendants in error also alleged that Tucker, the agent, failed to perform his duty as an agent of his co-defendant by refusing to bill, route and ship their cattle over the shortest and most direct and expeditious route **as directed** by the Defendants in error; but was governed by some secret, illegal agreement and conspiracy with said Railway Company, or illegal instruction from its officers, to route and ship all cattle that should be tendered to him over that line or route that would bring the most freight or revenue to the Company, etc., in other words, to force all freight over the "long haul."

That by the action of the Plaintiff in error these cattle were compelled to go the longer route about twice as far and were very seriously injured and damaged thereby.

The Plaintiff in error, T. & P. Co filed its original answer and, at the same time filed its petition and bond to remove the case to the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth; but the removal was refused by the Court. Said Plaintiff in error, then, filed what it termed its "First Amended Original An-

swer" in which it set up that it had transported the cattle to Paris, Texas, and delivered them there to its connecting carrier, the St. Louis & San Francisco Railroad Company, (which it termed the "Frisco", and which hereafter, for convenience, will in this brief be designated as the "Frisco Co;") and that the cattle were not damaged on its line, but if they were damaged as alleged the most of the damage complained of occurred on the line of the Frisco Company, and through its negligence and of that of its employees; and that if the defendants in error recovered judgment against the Plaintiff in error,it should have judgment over and against the Frisco Company, and prayed that they be made parties defendant; and that citation be served on that company, and that it be required to answer in this case. That if the Defendants in Error should recover against the Plaintiff in error that it have judgment over and against the said company, etc. That Plaintiff in error had the case continued to make the Frisco Co. a party as asked by it.

Plaintiff in error, T. & P. Co., after that, filed its "Second Amended Original Answer," and section three thereof is devoted entirely to its cross-complaint against the "Frisco Co." which company, on being impleaded, filed their original answer, and then filed its first Amended Answer replying to this cross complaint of the Plaintiffs in error. To this First Amended Original Answer of the "Frisco," the Plaintiffs in error filed their First Supplemental Answer, replying fully to the same.

The Defendants in error, Eastin & Knox, were not in any way interested in any of the issues raised by the cross complaint of the Plaintiffs in error; none of their pleadings directed any issue or complaint against the Frisco Company; nor did the Frisco Company in its answer to the cross-complaint of the Plaintiffs in error, in anyway refer to the Defendants in Error, Eastin & Knox. This was entirely a side-

issue and controversy raised by the Plaintiffs in Error in which the Defendants in Error, Eastin & Knox, were not in the least concerned.

While the Frisco Company is made a Defendant in Error herein, it has assigned no Errors and is taking no interest in the case.

The case was tried by the Court, and his Conclusions of Law and Fact are very full and accurate, and will be found on pages 81-84 of the Printed Transcript of the Record. A Perusal of these conclusions will show how grossly the cattle were treated and abused, and how great was the loss suffered by the Defendants in Error, Eastin & Knox; and the Conclusions of Law are not controverted and were fully sustained by the Supreme Court of Texas both times that this case was before it. (See Eastin & Knox v. T. & P. R'y Co., 99 T. 654, and T. & P. R'y Co. vs. Eastin & Knox, 100 T. 556.)

Should this honorable Court be authorized to review this case, in its entirety, which we trust will be done, our faith is so strong in the justness of our cause that we feel satisfied that the action of the State Supreme Court, affirming the judgment of the trial Court, will in all things be reaffirmed by this the Supreme Court of our land.

We will reply to the assignments of Error by submitting four counter propositions for your consideration.

We are aware that this court recently, **in re** Mary Dunn, et al. (a mandamus proceeding against Hon. E. R. Meek, District Judge, etc.,) passed upon a similar case to this; but as there are some features in this case which the Dunn case did not possess, we respectfully ask the Court to consider again with us this question as well as the other matters and questions not involved in the Dunn case.

I

(a). As a counter proposition, the Defendants in Error submit that the mere possesion of a Federal charter ought not to give the Plaintiff in Error the right to remove the case to the Federal Court, where there is joined with it a Defendant against whom the Plaintiff has a joint cause of action and who has no right that could arise under the constitution or law of the United States; or, in other words:

(b). Can the Texas & Pacific Railway Co., or any corporation incorporated by a federal statute, when sued in a state Court jointly with an employee, who is jointly responsible for an injury to plaintiff, or his property, remove the case from the State Court to the United States Circuit Court on his filing the statutory petition and bond for removal, and when the Plaintiff's Original Petition or complaint shows that the employee has no right or defense depending on, or under, said charter or Federal law, and himself could not remove.

The Defendants in Error in this case sought to recover a judgment against the Texas & Pacific R'y. Co. and its agent on a joint cause of action, for wrongfully and willfully shipping eighteen cars of cattle over a different route than the one they were instructed, and about twice the distance that was necessary, causing the cattle, by having to go over such a long and circuitous route, to suffer and become much damaged, etc., it being alleged that the agent conspired with the company's officers and violated his duty he owed to defendants in error as an agent for a common carrier to obey the shippers' instructions, or at least to

see that the cattle were shipped over the shortest and most expeditious route; and, having shipped them unnecessarily over the longer route because it was the Plaintiff in Error's road, and contrary to Defendants in Error's instruction and desire to have their cattle go over the line of the "Frisco," (which was only half the distance,) he was jointly responsible with plaintiff in error.

That the Defendants in Error, from their complaint as well as from the evidence adduced on the trial, had just grounds for sueing the agent jointly with the plaintiff in error is unassailable in law. (Southern R'y Co v. Carson, 194 U. S. 36. Eastin & Knox vs. T. & P. R'y Co, 99 Tex. 651. 2 Clark & Skyles' agency. Secs. 595-601).

The testimony shows that it was the agent, Tucker, who caused all the trouble, and that had he performed all the duties incumbent on him as the agent of a common carrier, and shipped these cattle as directed over the most direct route to their destination, instead of twice the distance around, as he did, the cattle would not have been damaged as they were.

It is a familiar doctrine that a corporation, possessing a Federal Charter, can sue in the Federal Circuit Court, (Osborne vs. Bank, 9 Wheat. 738;) and, also, that it has been extended so that, if such a corporation is sued in a State Court alone it can remove the case to the Federal Court. (Pacific Railroad Removal Cases, 115 U. S. 1.)

But, it was not supposed that the doctrine would be still further extended, to allow such a corporation to remove a case to the Federal Court where it was sued jointly with one who had no right dependent on the constitution or a Federal Law, and who had no right to remove. This position was strengthened by the decision of this court in the case of C. R. I. & P. R'y Co. vs. Martin, 178 U. S. 245.

This suit, as well as the Martin case above cited, involves the construction of the Act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, Sec. 2,) which provides:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit Courts of the United States are given original jurisdiction by the preceeding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the Defendant or Defendants therein to the circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceeding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the Defendant or Defendants therein, being nonresidents of that state," etc.

Justice Fuller in the Martin case holds that the first clause of that act is to be construed in the same way as its second clause with reference to the joinder of all the defendants:

He says: "There was no separable controversy here. The case presented a joint cause of action against all the Defendants, and, indeed, the removal was applied for on the ground that the suit arose under the Constitution and laws of the United States. It therefore came within the first clause of the section quoted, and if the same rule governs proceedings under that clause that obtains in respect of the second clause, the judgment of the Supreme Court of Kansas must be affirmed. And in view of the language of this statute we think the proper conclusion is that all the Defendants must join in the application under either clause." (178 U. S. 248.)

It seems, then, that with reference to the joinder of defendants that all must be joined to effect a removal from the State court into a Federal Circuit Court; and, such construction being permissible, the proposition it seems would be tenable to the effect that as a Federal corporation could only effect a removal from a state court into a Federal circuit court when it was the sole defendant that, when a defendant was joined with it against whom there was a well founded joint action, and who could not remove, the removal could not

be accomplished.

It does not seem to be an illogical conclusion from this reasoning to require a similar construction in both instances, nor does such a construction do violence to the language of the act.

In support of this proposition we refer to the language of Chief Justice Fuller used in the Gody case: "Conceding this, (referring to Federal corporations,) the principles applicable to diverse citizenship may reasonably be applied to them." (166 U. S. 609.)

In discussing this Martin case, supra, Justice Rainey of the Texas Court of Civil Appeals, uses this language:

"Where the removal was sought by a part of the defendants, it being alleged that the controversy arises under the Constitution and laws of the United States, the Court, in effect, holds that the same rule of procedure obtains where the removal is sought either on the ground of a Federal question being raised or of diverse citizenship. The Court also held that all the defendants must join in the application, but the facts show that all the defendants were entitled to removal had they joined in the application, but some of them did not do so. To the same effect Miller v. Bank (C. C.) 116 Fed. 551. * * * The proper construction of the foregoing decisions on this question, in our opinion, is that the courts only intend to hold that in suits involving no separable controversy, there being more than one defendant, each defendant should have a cause for removal, and each should join in the application for removal; otherwise in this case the question of removal would be absolutely controlled by the pleasure of Defendant Oliphant, as to whom no legal grounds for removal exists. We cannot believe that the law confers such a privilege upon a defendant in his condition, and therefore hold that the Court did not err in retaining jurisdiction to try the case." (T. & P. R'y. Co. v. Huber, 55 S. W. 548.)

Justice Gaines, also commenting on the Martin case, when

the Huber case was before the Supreme Court of Texas on writ of error, said:

"We are of the opinion, therefore, that in the remark quoted, it was not intended to imply that where only one of two or more defendants could have removed a case, if sued alone, there being another or other defendants who had no right of removal, such right would exist provided all should join in the application." (T. & P. R'y. Co. vs. Huber, 100 Tex. 7.

This construction is in accordance with the purposes of the enactment of this act, and appear to have been followed by the lower courts regardless of this fact.

We would call the special attention of this Court to the language quoted by Justice Gray in the case of Tenn. v. U. & P. Bank, supra from N. O. R'y Co. v. Mississippi, 102 U. S. 135, substantially to the effect that while Congress may have intended to allow the removal of a suit when the very foundation of a suit was a Federal law, it did not intend to authorize a removal where the cause of action depended solely on the law of the State and the Federal law came in only incidentally. It was also added that the Defendant was not without remedy in a Federal court, for if he had properly pleaded such defense he could have appealed to the U. S. Supreme court if the State court decided against him. The quotation is very applicable to this case, and we would be pleased for the Court to bear it in mind as we wish to refer to it again.

This is also in accord with the general principles so often enunciated by this Court that a substantial dispute as to the construction of the Constitution or laws is essential. (Western Un. Tel. Co. v. Ama. Arber R. R. Co. 178 U. S. 243-345). The case must be one that **actually** and potentially arises, "and jurisdiction cannot be assumed on mere hypothesis" (New Orleans, etc. vs, Benjamin, 153 U. S. 411.) Chief Justice Fuller approves of this principle in the Martin case, and quotes the language of Chief Justice Waite

employed in Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 203, 24 L Ed. 656, 658:

"A cause cannot be removed from a state Court simply because, in the progress of litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. * * * * Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading, * * * that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." (178 U. S. 250.)

Two things are necessary to the existence of a Federal question: First, An actual dispute between the parties as to the meaning of some law of the United States; Second, materiality of the construction of such law to a determination of the cause. California Oil, etc. Co. vs. Miller, 96 Fed. Rep. 16.

We respectfully submit that in the present case there arose no question whatever touching a Federal Law, nor were any of the charter rights of the Plaintiff in error called in question. Nor, indeed, under the system of pleading in Texas, could they have been, as there was no special plea verified by the affidavit of the Defendant, attacking the charter of the Defendant company or its right to sue. The Texas Revised Statutes Art. 1604, Sec. 7, provides as follows, to-wit:

An answer or other pleading setting up any of the following matters shall be in writing and signedby the party or his attorney and verified by affidavit. 7. That the Plaintiff or Defendant suing or sued as a corporation is not a corporation as alleged."

As we understand, the same practice must be followed in the Federal Courts in Texas, according to the United States Revised Statutes, Sec. 914:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State within which such Circuit or District Courts are held, and rule of Court to the contrary notwithstanding." (West v. Home Insueance Co. 18 Fed. 622. Catlin v. Stinson, 18 Fed, Pract. 806.)

But we understand from the decision in the Osborne case supra, that this question forms an original ingredient in every case whether it be in fact relied on or not; and that the inherency of the question in the case alone gives the right to sue in the Federal court. We also know that this doctrine was re-announced and extended in the Removal Cases.

This language is used in the opinion in the Osborne case. When a bank sues "the first question which presents itself or which lies at the foundation of the cause is, Has this legal entity a right to sue." Technically, in that case,—a case in which the right to sue was in question,—this may be correct. But does not its application to removal cases from State to Federal courts run counter to the principles enunciated in the foregoing decisions which we have cited and quoted. In this case for instance, is there any substantial dispute as to the construction of its charter or of any right thereunder, or

of any law, except the mere right of removal? In case of New Orleans v. Benjamin, 153 U. S. 411, the doctrine is clearly enunciated that in order for the circuit court to have jurisdiction the case must be one **actually**, and not **potentially**, arising under the laws "and jurisdiction cannot be assumed on mere hypothesis." The result of the suit must depend upon the constitution. The decission of the removal features of this suit does not really affect its result.

But it is asked, is not the question potentially in the case? We respectfully submit that this can not logically be asserted. It is a question that may arise in some case with which the Plaintiff in error may be connected, because it owes its existence to a Federal law, but that does not necessarily inject that question in any particular case. The record of this case does not disclose a single point raised in the remotest way touching a Federal question.

The Act of Congress, while creating the corporation and giving it the privilege to sue in the Federal Courts, never, **eo nomine,** granted it any such right to remove. The decision in the Osborne case, as we understand it, was really a constitutional one as to the right of the bank to sue in the Federal Courts at all; and was, perhaps, correct enough. But should the doctrine be so extend as to permit the construction of an act of congress, granting a Federal charter, to mean that the mere possession of the charter under this act gives a right and privilege and an exemption which no other corporation or person possesses. The decisions concerning Federal corporations have established an anomalous rule of doubtful logical support, and can't be consistently adhered to.

What is this Honorable Court asked to determine? Some material issue in the case? Some right that it has under the Act of Congress? No. But, by construction, to write in that Act a provision that Congress never put there—a privilege that no other class of corporations or persons possess—permitting such corporation to dictate in what courts they shall

be sued, notwithstanding, it may be doing business in a state and from which it has obstained the valuable privilege of exercising the right of eminent domain. Did the framers of the statute creating the Plaintiff in Error contemplate any such thing? In fact, did Congress, when it enacted this act, contemplate that the Plaintiff in Error should have any more or greater right to remove a case from the State to the Federal Court than any other corporation or person.

It impresses us that the actual suit itself must arise under the constitution or laws of the United Stqtes before the suit is removable. The application of the reasoning in the Osborne case to the Pacific Railroad Removal cases is very unsatisfactory, and, it seems to us, (if we may be allowed to offer an opinion,) does violence to the language of the Removal Acts as the doctrine is not deducible, ex vi termini, from its languuge. We may account for its long standing unreversed both from the fact that the occasions seldom arose for questioning it and the respect the courts must maintain for precedent as much as to its claim of being well founded in reason. The suit now before you cannot be said to have arisen under the law creating the incorporation, for this would involve its very terms, which is not the case.

Nor can it be "fairly claimed or contended for" that a construction of any part of said act of Congress creating it is in the case as disclosed by the record, (Minnesota v. Duluth etc. Co. 87 Fed. 497.) Under the statute of Texas referred to, this question could not even become potential until a plea was filed attacking its corporate existence; and, until a plea was filed we respectfully submit that there was not a substantial nor actual dispute as to the construction of the said company's charter or the statute incorporating it. It was not even possible. We also respectfully suggest that any other construction is at variance with the objects and intention of the statutes of 1887 and

1888 as decided by this court in the case of Tenn. v. Union & P. Bank **supra,** and also with the intimation in the Martin case, supra, that the first and second clauses of said act should be construed alike and the language used in the Cody case that the principles applicable to diverse citizenship may reasonably be applied to them. And may we also respectfully ask, Does not the application of the principles in the Osborne case raise a mere creature of man above man himself and endow it with privileges which its maker does not possess. Can this be done?

But, pardon us. We trust that the Court may not think that we are essaying to do that which has been heretofore more ably discussed. Pardon us if we again reiterate that no attack could have been made in this case on the existence, or charter rights, or the incorporation in anyway of the Plaintiff in Error until a verified plea has been filed as provided for in Section 7 of Article 1604 of Revised Statutes of Texas, and until this is done no actual construction of any Federal right arising by said act of Congress was even in the remotest manner in this case, substantially or potentially.

Before closing our remarks on this proposition, we can make no better nor stronger argument than to present for your consideration the language of Justice Gaines in concluding his opinion in the case of T. & P. R'y. Co. v. Huber, Supra: "It seems to have been urged in the Court of Civil Appeals that the bare fact that Oliphant, the co-defendant of the Texas & Pacific Railway Company, was its engineer, and that the negligence with which he is charged is alleged to have occurred in the discharge of his duties, makes a case arising under the laws of the United States as to him. We find it difficult to reconcile the rule established in "The Removal Cases" (115 U. S. 1), that the mere allegation that a corporation was created by virtue of an act of Cougress of the United States, makes a case aris-

ing under the laws of the United States, with that line of decisions which hold that in order to make such a case it must appear from the allegations of the Plaintiff's petition that there is a substantial dispute as to the construction of some law of the United States upon which the decision of the case depends. Whether the removal cases were correctly decided or not, we are bound to take them as established law; but to apply the rule to the servant of a corporation created by the laws of the United States, is to go one step further, and we are of the opinion, that the doctrine should not be extended. The doctrine in the removal cases is rested upon the case of Osborne v. The United States Bank (9 Wheat., 738). The question of jurisdiction there involved was whether the Act of Congress which chartered the Bank and attempted to give it power to bring suit in the Circuit Court of the United States was in accordance with the Constitution of the United States. It was held that it was. Since the constitution declared that "the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States" and some others not necessary to be mentioned, Chief Justice Marshall, who wrote the opinion, in discussing the question whether a suit by the United States Bank which was chartered by Act of Congress was a case arising under the law, says: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is the law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only the mere creature of a law, but all of its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the

law?' It was upon the propositions there laid down that 'The Removal Cases' were decided. But do they apply to the servant of a corporation, chartered by Act of Congress, merely because he is a servant of such a corporation? To ask the question, it seems to us is to answer it in the negative. There might be a case, in which the charter of a corporation of the United States placed some restriction upon the liability of the corporation or of its servants for certain acts, or granted some immunity not allowed by the laws of the State or the general rules of the common law, which would go to the foundation of the action. Such might make a case arising under the laws of the Uuited States. But as we understand the statement upon which the question here presented is based, the original petition of the plaintiff in the State Court made no such question." (100 Tex. 8, 9.)

II

The Plaintiffs in Error, T. & P. Rl'y. Co., after filing its petition and bond for removal, waived its right to remove by voluntarily appearing in the state court, and filing what it called its "First Amended Original Answer," by which answer it voluntarily impleaded and made The St. Louis & San Francisco Railway Company a party Defendant in the suit below, and sought to recover a judgment over against it for damages and recovering judgment against it for $1800.00, as this latter proceeding was an affirmative action on its own part by which it elected to retain Defendants in Error in the State Court, not for the purpose of defending itself, but to have the matter litigated and, at the same time, to prosecute its rights and enforce them, by obtaining a judgment of

the State Court against the St. Louis & San Francisco Railway Company—a party whom Defendants in Error had not sued.

Both the original answer of Plaintiffs in Error and its petition and bond for removal were filed on April 1st, 1904.

On April 7th, 1905 the Plaintiffs in Error filed what it it called its "1st Amended Orignal Answer." which is as follews, to-wit:

(We copy from the printed Transcript of Record, pp. 20, 21.)

"1st Amended Original Answer of the T. & P. Ry Co., Filed Apr. 7, 1904. In the District Court of Parker County, Tex., Eastin & Knox vs. The Tex. & Pac. Ry. Co., Et Al.

"Now comes the Texas and Pacific Railway Company, and protesting against the right of this court to hear and detetrmine this case, with leave of the court files this its first Amended original answer in lieu of its original answer filed herein on the day of 1904, and for answer says: It denies each and every averment of the Plaintiff's Petition, and says the same are not true in fact. It further says that Plaintiff's cattle in controvery were shipped by them on written contracts signed by Plaintiffs and Defendadant, The Texas & Pacific Ry Co. in which the cattle were shipped to Paris, Tex. They were not routed nor billed to or by Menett, Mo., but were at Paris delivered to to the St. Louis and San Francisco Ry Co. Said contract is dated Strawn, Texas, April 23rd, 1902. By its express terms this defendant limited its liability to its own line of railway and is not to be liable for anything beyond its line which end of its line was Paris, Tex. It also provided in said contract that the Plaintiffs will feed, water, take care of the cattle when awaiting shipment, while being loaded, unloaded, reloaded and transported, etc. This Defendant says said cattle were not in its possession over 28 hours and there was no necessity to feed and water them. This Defendant further says that Plaintiffs wanted their cattle routed by

Fort Worth & Frisco route; he was notified that its agent had no authority to bill them that way, but could bill them on through billing by Sherman or Paris. Plaintiffs then consented to bill them by Paris, and it was done. The Frisco Co. recieved them there and routed them to destination but could have sent them to Tulsa by a nearer way than by Monett, had it desired it. The Defendant makes the contracts above referred to a part hereof, marked "A". This defendant say it carried and delivered the cattle to Paris, Tex., safely and carefully on reasonable time. The defendant further says that the St. Louis & San Francisco R'y Co. is duly incorporated and operates its line of railway in Lamar County, Tex. and has a local agent agent at Paris, Tex., towit, C. Griffith. The most of the damage complained of by the plaintiff occurred on its line of railway. The defendant the Tex. & Pacific Ry. Co asks that it be made a party defendant herein and asks that citation be served on it and that it be required to answer in this case, and on trial that if Plaintiff should recover against this defendant it have judgment over against the said Ry. Co. for such damages as were caused by it.

Having answered it asks to be dismissed with its costs.

B. G. Bidwell and H. C. Shropshire,
Attorneys for Defendant T. & P. Ry. Co.

While purporting to be an answer, it is really a cross-petition, impleading "the Frisco," because it sets up a cause of action against the St. Louis & San Francisco Co., (which is therein termed the "Frisco") and prays the state court that citation issue to it and that it be made a defendant, and to require it to answer in the case, and that on trial, should defendants in error recover, that this plaintiff in error have judgment against said railway company for all such damages as were caused by it. In this pleading, strangely called an **answer**, there is no prayer or relief asked against Defendants in error, Eastin & Knox. It is simply an application to the State Court to have a **new** party made defendant and that the rights may be adjudicated between these two parties. There is no part of the said

answer really directed against Defendants in Error but the general denial. Hence, it is not a defensive pleading at all. But the Plaintiff in Error did more than merely file said answer to make the "Frisco" a party defendant. It also made a motion to continue the case in order that service of citation could be had on the Frisco so that it could be required to answer at the next term of the State Court, and succeeded in obtaining this continuance. (See Supplemental Transcript in printed Transcript of Record, pp. 122, 128.) Citation was issued accordingly and served on the "Frisco" Company; and it answered at the next term. (Supplemental Transcript in printed Transcript of the Record p. 122;) and it got its judgment against the "Frisco" for $1800.00.

The Plaintiff in Error also filed a Second Amended Original Answer in which it had a cross petition, amplifying its original cross petition against the "Frisco." (Printed Transcript, pp. 26-29.)

The "Frisco" appeared in response to this cross action of the Plaintiff in Error, and files its answer thereto. (Printed Transcript pp. 39-42.) Its answer shows that it was impleaded by the Plaintiff in Error: and that it was in no way concerned in the controversy between the original parties, and directed all of its allegations and defenses against the Plaintiff in Error.

Plaintiff in Error then filed its First Supplemental Answer which in its recitations shows was solely in response to the first Amended Original Answer of the "Frisco", (Printed Trans. pp. 42-43.)

Such were the pleadings. The Statement of Facts also shows that the issues were entirely different, and that said defendants in Error and the "Frisco" were not concerned, or interested in the evidence adduced, or the issues raised by each other. It also shows that the Plaintiff in Error compelled these Defendants in Error to stand

by and witness the "sparring match" between the two companies. The Defendants in Error would take a witness and examine him in chief, and then the Plaintiff in Error would cross examine him, and after that the "Frisco" and the Plaintiff in Error would have their tilt over the witness. Besides, these two railway companies had their witnesses and testimony in which the defendants in error were in no way interested.

This so-called answer is not defensive, nor does it seek any relief, nor offer any prayer as against the defendants in error. While it sets up the contract of shipment, it does so in order to make out a cause of action against the "Frisco". These are the facts on the removal issue.

Clearly, these Defendants in error were in no way concerned in the issues raised by this cross action of the Plaintiffs in against the St. Louis & San Francisco Railway Co. this controversy was certainly not a defense to the suit of the defendants in error, being entirely collateral thereto.

Now it is true that if the state court refused to order a removal, and retains its jurisdiction, and the petioner is compelled to remain in the state court, he does not have to remain inactive and allow judgment by default to go against him. He has a right to remain and defend the suit against him. But there is this distinction. He can only defend. If he seeks to take affirmative action and appeal to the court for relief in order to better his condition, that is, asks for something independent of and alien to the plaintiff's case, he elects to submit to the jurisdiction of the court. After making this election he cannot insist on his removal proceeding and insist that the court has no jurisdiction to try the case. He must be perfectly fair and mean what he says, that he does not recognize the jurisdiction of the court. The Federal Courts will not permit him to experiment with the courts or speculate with his cause of action.

He must be consistent. C. I. & N. P. Ry. Co. v. Mim. & W. Ry. Co. 29 Fed. 337; 341.)

On the question of waiver, the case of Manning v. Amy, 140 U. S. 137, seems to possess similar features with this case. The petitioner in his petition to remove stated that he filed the same subject to a motion to dismiss the action. We quote the following pertinent language from the Manning case: "The record recites that after the motion touching the removal, 'thence the same was continued nisi to the January term, 1885, the defendant reserving his right to remove to the circuit court of the United States as aforesaid', the continuance being manifestly ordered for the purpose of an opportunity to hear and determine the said motion and plea. The avowed purpose of the defendant in the proceedings was to have the state court retain jurisdiction for the purpose of getting a judgment in his favor, and not to have the case removed unless the judgment went against him. It is clear that Congress did not, by the act of March 3, 1875, intend to allow the defendant to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceeding, and take his case to another tribunal. Removal Cases, 100 U. S. 457, 473 (25: 593, 599). Such a proceeding was not authorized by that Act." (Book 35, L Ed. U. S., 388.) And the court held that the subsequent action of the defendant in calling the attention of the court to the removal proceedings at a subsequent term was unavailing. Now we think this is a similar case. The petition for removal and the original answer were filed at the same time, April 1, 1904. (Printed Transcript pp. 9, 11.); But the bond for removal was not **approved** until April 5th. On April 7th the so called First Amended Original Answer of the Texas & Pacific Railway Company was filed in which they set up the cause of action against the "Frisco" Company and asked "that the Frisco Company be made a party defendant, that citation be served

on it, and that it be required to answer in this case; and on trial that if plaintiff should recover against this defendant it have judgment over against the said Railway Compan- for all such damages as were caused by it". (Printed. Transcript pp. 20, 21)

On April 7th, 1904, the very same day that the pretended First Amended Original Answer was filed, the Plantiff in Error had a Citation issued requiring the "Frisco" company to appear and answer its amended original answer filed on that day. This was served on the 13th of April, (Printed Transcript pp. 122, 123.)

Of course, in order to have the "Frisco" served with citation, and made a party, it was necessary to continue the case to the next term; and so the Plaintiff in Error had the case continued by order of the court. The order of continuance was made on April 21, 1904, (Printed Transcript p. 128,) thus showing that Plaintiff in Error took ample time to consider this action in continuing the case.

At the next term of court, the plantiff in error filed its Second Amended Original Answer in Section 3 in which it more amply sets out its cause of action against the "Frisco" Company, and the Frisco Company filed their First Amended Original Answer, as before stated, to this cross-action that the plantiff in error filed against it; and on Nov. 10th, before proceeding to trial, the "Frisco" company presented its demurrers and special exceptions to the cross bill of the Plantiff in error, which were overruled, to which the "Frisco" Company excepted. (See Orders on Exceptions, Printed Transcript p. 85.)

On Nov. 11, 1904, the court rendered judgment in favor of the defendants in error against the Plantiffs in Error for 3600.00, and also rendered a judgement over in favor of the Plantiffs in Error against the "Frisco" Company for $1800.

While the petition for removal in this case is not in its

terms conditional, the recital of the above facts from the record show unequivocally that the Plantiff in Error intended it to be such, and it clearly was such, and came clearly within the spirit of the case of Manning v. Amy, supra., If the Tex. & Pacify. R'y Company had intended in good faith to have removed the case why did it file this cross bill or action aginst the Frisco Company, and have the case continued to make it a party to the suit so that the matters between them could be litigated and settled in this suit? This could be accomplished in the U. S. Circuit Court just as well, but it covertly tried to get two shots when it was only entitled to one.

Let us look at some of the other authorities.

First, we will consider Hudson River R. R. & Term. Co. vs. Day, 54 Fed. 545. This language, very applicable to our case, is used:

"It is admitted that at the very time Mr. Day filed his petition for removal in the circuit court of Bergen County, he obtained from the supreme court, or from a justice of the supreme court, a writ of certiorari directed to the Bergen county court, requiring that court to send up all the record and proceedings which had theretofore been had in the case, that they might be reviewed by the supreme court sitting in banc; that the proceedings and record have been sent, in obedience to the writ, to the supreme court, and a review has been had, both parties being represented by council. The argument on the certiorari took place before the supreme court months after the filing of the petition for removal of the controversy to this court. I think that Mr. Day, in choosing the state tribunal for the protection of his rights, has waived his right to remove his cause to the federal tribunal. He cannot proceed tentatively in either court. He must make his selection. If he chooses to rest the protection of his rights with the state tribunal, he cannot afterwards seek to delay or embarass the final determination of his case by appealing to the federal tribunal. A single illustration will show that this double proceeding cannot be permitted. If the supreme court of New Jersey, upon considering the validity of the

proceedings heretofore had in the condemnation, should set them all aside, as illegal or unwarranted, what pretense would there be that there was any cause to be removed or to be heard in the federal tribunal? The action of the supreme court of the state of New Jersey would be final in the premises, and there would be remaining no controversy to remove into this court."

"I think the case of Amy v. Manning, 144 Mass. 153, 10 N. E. Rep., 737, is much in point. In that case the defendant filed a motion to dismiss a pending cause, and also a petition for removal, and with the latter a motion in which he asked, in case the motion to dismiss should not be granted, the court would order the removal as prayed for in the petition. The court overruled the motion to dismiss and then held that by his conduct, in moving to dismiss the case he had lost his right to have it removed. This case is certainly very analogous to the one now before the court. When Mr. Day presented his petition for removal, he asked also for the allowance of a writ of certiorari. The distinct object which he had in view was to obtain from the supreme court of New Jersey an adjudication, in effect, setting aside all proceedings in the cause which had theretofore taken place. This is tantamount to a motion to dismiss the case. Having taken that course simultaneously with the filing of his petition for removal, I think he has, by such election, waived his right to remove the controversy to this court, and hence the motion to remand is granted."

In Case v. Olney, 406 Fed. 433, it was held that a person, through not even served with process, who voluntarily files a demurrer and stipulates as to hearing the same, waives his right to remove; and the following extract is quoted with approval:

"Moreover, in view of the delays in litigation arising unavoidably from the right of removal, the construction of doubtful provisions should be in favor of requiring the greatest diligence from parties exercising that right. Frink v. Blackington Co. (C. C.) 80 Fed. 307."

In connection with the cases of Hudson River R. R. & Term. Co. vs. Day, and Case vs. Olney, we call the court's

attention to the fact that the answers in the trial court of the Plaintiffs in Error are general and not special. Tucker's answer read:

"In this case the Defendant J. M. Tucker for answer says he excepts generally to Plaintiff's petition and says the same does not state a cause of action against him, upon which he prays judgment.

"For further answer he denies each and every averment of Plf's petition, and says the same are not true in fact.

"Having fully answered, &c.

And the answer of the Texas & Pacific R'y Company read:

"In this case the defendant, the Tex. & Pac. Ry. Co. comes and for answer says, It denies each and every averment of Plaintiff's petition, and says the same are not true, Having answered, etc."

It does seem that where the Plaintiff in error impleaded a new party in the suit, and had the case continued to have it served with citation, and to obtain judgment against it, that this should have the effect as the stipulation to continue as both acts are voluntary on his part.

A party waives his right to remove when after filing his petition and bond for removal, he applies for a change of venue and succeeds therein. First National Bank of Wason v. Conway et al, 67 Wis. 210, (30 N. W. 715.)

It has been held that when a defendant, after his petition for removal has been denied, amended his pleadings which the court allowed, and prosecuted a writ of prohibition and an appeal to the State Court of Appeals, such subsequent proceeding was a waiver of his right to remove. West Va. v. King, 112 Fed. 369. In the opinion in that case the court says:

"The action taken by him in the circuit court of Cabell county, after said court refused to enter the order of removal, was as follows: The court denied the motion to remove on the 5th day of August, 1901, and on the 24th day of that month King presented to that court an amendment

of the pleadings theretofore filed by him, relating to the lands in controversy and the taxes due thereon, which amendment was, by the order of said court, duly filed and on the same day an additional order was entered, by which the relief prayed for by King in his said amended pleading was granted. The proceedings in the supreme court of appeals of West Virginia consisted of an application for a writ of prohibition, the object of which was to compel the court of Cabell county to proceed with said cause in a particular manner, which King insisted had been fully designated by the court of appeals when the cause was before that court, on an appeal theretofore prosecuted by the state of West Virginia. These proceedings in said courts of the state of West Virginia were not only inconsistent with the existence of an honest intention on the part of King to remove the case to the circuit court of the United States, but indicated a design on his part, whatever may have been his previous purpose, to proceed with the controversy in the circuit court of Cabell county. This conduct of the defendant King, extending from the 5th day of August, 1901, when his petition for removal was filed, down to and including the 2nd day of September, 1901, when he proceeded in prohibition, constituted a waiver of such right as he held, by virture of the filing of his petition and bond, to remove the case into this court. When the defendant King on the 17th day of September, 1901, presented the record of this case to this court, and moved that it be docketed herein, the case was then, by reason of his own action and for purposes of his own, regularly pending in the circuit court of Cabell county, W. Va."

The application of the above decision to the facts of this case are apparent. Plantiff in error was seeking to get as much advantage in this case by filling its Cross action against the "Frisco" Company as King was in that case in applying for his writ of Prohibition and taking his appeal. In fact, Plantiff in Error injected an entirely new issue in this case and sued a new party against whom the defendants in error had brought no complaint and had not sued.

We are aware that this court held in Nat'l S. S. Co. vs.

Tugman, 106 U. S. 118, that after a party had perfected his right to the removal of his case he does not waive it when such a right is denied by the ruling of the State Court, by appearing and contesting before the court or a referee appointed by it, as he has the the right to select any mode of trial for the trial of his case recognized by laws of the state. But it seems that when a party to avoid an immediate trial elects to try his case by a referee, and thus prevent an immediate trial **is precluded** from claiming a removal of the case. In Hanover Nat'l Bank v. Smith, et al, Federal Cases No. 5,035. Circuit Judge Johnson in delivering the opinion said:

"In respect to the second question stated, an examination of the facts presented is necessary. The case was called for trial, and might in the ordinary course have been tried, when the defendant applied for a postponement. This was refused by the court, except upon terms of defendant's consenting to a referee. This he, in the first instance, refused to do, but afterwards, and before the trial was actually commenced, he consents to the reference of the cause for trial, to a person named. The order was made accordingly and the immediate trial which otherwise must have taken place was thus avoided. Under these circumstances, the defendant ought to be considered as estopped from making an application to remove the cause. The case is not, in my judgment, within the meaning of the statute. **Its language is general, but the right it gives is the right of the party concerned, and he may waive it. It is to be considered as if the right to waive its benefit were expressed in the statute.** defendant was in time to apply for removal when his case was called for trial, but his consenting to a reference, under the circumstances shown, ought in justice and does, I think, in law, preclude him from a subsequent application to remove the cause. To hold otherwise, would recognize a consent to a reference as an allowable resort to gain the postponement of a cause, and the consequent extension of the time limited for its removal into the circuit court."

The case of Brooks vs. Clark, 119 U. S. 502, has considera ble bearing on the question we are considering. It seems

that where one partner has been sued on a partnership transaction and a judgment by default has been taken against the party sued, if the other voluntarily enter appearance, after the rendition of the judgment, he can not remove as the act was voluntary and the time is passed when the case could have been tried. The court in that case says:

"This is a proceeding in the original suit and on the original cause of action. If a judgment shall be rendered against Charles H. Brooks, it will be a judgment in the original action, the same in all respects, except as to date, that it would have been if he had been served with process and had put in the same defense before the judgment against Josiah D. Brooks. He voluntarily appeared 'in the same suit' by accepting service of the original summons, but with an extension of time to put in his personal defense. Had the same thing been done before the judgment against Josiah D. Brooks, there could have been no removal on the petition of Charles H. Brooks" &c.; and again, "As Charles H. Brooks made himself a party to the 'same suit', he voluntarily subjected himself to the obstacles which were in the way of removing his controversy to the circuit court, and must be governed accordingly. Fletcher v. Hamlet, 116 U. S. 408. (Bk. 29 L.ed.679)"

The right of removal, as we understand it, is akin to the right or privilege of being sued in the county or place of one's residence, and can be waived. For instance, the Revised Statutes of Texas provide in Article 1194, to-wit: "No person who is an inhabitant of this state shall be sued out of the county in which he has his domicile except in the following cases, to wit:" It then enumerates twenty-three exceptions. Article 1194a prescribes the sufficiency of such a plea of privilege, to-wit:

"A plea of privilege to be sued in the county of one's residence shall be sufficient if it be in writing and sworn to, and shall state that the party claiming such privilege was not at the institution of such suit, nor at the time of the service of such process therein, nor at the time of filing such plea a resident of the county in which such suit was instituted, and

shall state the county of his residence at the time of such plea, and that none of the exceptions to exclusive venue in the county of one's residence mentioned in article 1194 or article 1585 of the Revised Statutes exist in said cause."

It was held in the case of Douglas v. Baker, 79 Tex. 499, 505, that had the defendant rested upon her exception to the jurisdiction, that she was sued out of the county of her residence, the court should have sustained the same:

"But we think that the defendant having invoked the jurisdiction of the court upon original and independent matter set up by her, claiming the land, making Reynolds a party, and asking judgment against him for the land, waived the question of jurisdiction raised by her exceptions. The entire form of the motion was changed by her from a suit to establish a lost power of attorney to action of trespass to try title, and in order to a recovery she made the person claiming the land a party defendant. The issue made by her was tried and adjudged against her. Having brought into court a new **party defendant** to try title to the land with him as a purchaser from plaintiff pending the suit; becoming the actor, and claiming **affirmative relief** upon an issue with him that could only be tried in the county where the land was situated, she was in no attitude to disclaim the jurisdiction of the court or to insist upon her exceptions. She voluntarily submitted to the jurisdiction of the court, or rather invoked its jurisdiction as to a new party, and ought not to be allowed to repudiate it."

In Slater v. Trostel, 21 S. W. 285, where the defendant Slater had filed a cross-bill against the plaintiff Trostel and the defendant Hutcheson, seeking relief against them, the same principle was adhered to,—that the plea of privilege was waived.

In Benchoff v. Stephenson, 72 S. W. 106, it was held that the exception to the filing of the suit on a holiday is placed in the same category with pleas of privilege, and that an exception on that ground was waived where the defendant filed a plea in reconvention which constituted a demand for independent relief. The court said:

"The county court obtained jurisdiction of the cause of action throug the filing in the justice's court of the plea in reconvention and, no matter if the plea in re-convention was dismissed by the county court, that action did not defeat the jurisdiction which had attached, and the county court should try the cause on the demand of plaintiff in error. Dwyer v. Bassett, 63 Tex. 274; Tidball v. Eichoff, 66 Tex. 58, 17 S. W. 263."

Thus, in analagous cases, the courts of Texas have uniformly held that where jurisdiction really depended upon the consent of personal privilege it could be waived, and was waived when the defendant sought by plea of reconvention affirmative relief against the plaintiff, or by cross bill, introduced a new party into the suit and sought to recover against him independently of the plaintiff's cause of action, and that the jurisdiction of the court attached. While we understand that if a proper petition and bond for removal are seasonably filed that the jurisdiction of the state court, eo instante, ceases, still this right to remove, notwithstanding the filing of the petition andbond for removal can be waived, and the jurisdiction of the state court restored. This being a privilege, it certainly should be a right that could be waived, and has been so held consistently by the decisions heretofore cited and quoted at length. TheFederal court, the statute says, shall have concurrent jurisdiction and "**may be** removed by the defendant or defendants therein" &c, leaving it optional with the defendant or defendants to remove. Hence,

Plantiff in Error, having at the same time filed both their original answers and petition and bond for removal, and at the same term of the court, only six days after the filing of the said petition and bond for removal, filed their said cross bill or petition, making the "Frisco" a party defendant, and asking affirmative relief against it on an independent cause of action, and having continued the case in order that citation may be served on the "Frisco", and to make it a party defendant, and, having at the next term

of the court, recovered judgment against the "Frisco", they waived their right of removal to the Circuit Court and consented to the state court proceeding with the trial of the cause.

III

(a.) Plaintiffs in Error could not have removed this case to the United States Circuit Court unless all the defendants joined in the petition for removal.

(b). The Plaintiff in Error, Texas & Pacific Co., having voluntarily made the "Frisco" a party defendant, after it filed its petition and bond for removal, could not then remove this case to the Federal Court unless the "Frisco" joined in the petition for such removal.

(c). Plaintiff in Error, the T. & P. Co., having voluntarily made the "Frisco" a party defendant, after it filed its petition and bond for removal, and invoked the jurisdiction of the state court in in its own behalf in order to obtain judgment over on its cross action against the "Frisco", it cannot now claim that the state court had no juri-diction to render the judgment it did against the Plaintiffs in Error, as well as the judgment in its favor against the "Frisco" company.

The "Frisco" never joined in the petition to remove. (See Printed Transcript pp. 9-11, for the petition, and p 12 for the bond for removal.)

We think that the Chicago, Rock Island & Pacific Railway Co. vs. Martin, supra, is decisive of this proposition. But it may be urged that this case is different from the Martin case, in this: That all the the defendants that the plaintiff sued joined in the petition for removal, and the "Frisco" was not made a party defendant until after the removal had been denied, and this action was taken in order to defend Plantiffs in Error against impending danger, which it had the right to do. But this we deny, and we insist that this action against the "Frisco" was not a defense to the suit and to call it such is unwarranted. It was a voluntary action on the part of the Texas & Pacific Company, and if it had intended to assert its right in the Federal court and insist on the removal to that court it could as well have gone into the Federal Court and proceeded against its co-defendant, the "Frisco"; and would thus, beyond the peradventure of a doubt,—to the court as well as to all parties,—have established that they intended in good faith to rely upon their removal proceedings. By doing so, they would not have deceived the defendants in error, nor would they have put them to the expense of litigating the matter in the state court.

In fact, it could have appealed to that court for an injunction and prevented defendants in Error from proceeding any further in the state court. There is no reason on earth that can be justifiably urged to sustain the said plaintiff in Error in making the Frisco a party defendant, in continuing the cause to do so at that, and causing all the trouble and expense to be incurred that was incurred in the lower court; and, then, after being defeated in its action, to say that the state court had no jurisdiction to try this case. By such action, it seems to counsel, the said plaintiff in error has incurred the censure of the Federal Court for trifling with its Federal Right, and experimenting with the jurisdiction of both the Federal and State courts. Counsel, certainly, can

see no difference between this action of said plaintiff in Error, and applying to the state court for a change of venue, as in the case of First National Bank of Wason v. Conway, 67 Wis. 210, (30 N. W. 715); or, in amending its pleadings, and prosecuting a writ of prohibition to the state court of appeals, as in West Va. v. King, above cited; or where a land owner appeals to the supreme court for a writ of certiorari, to have the court remove the record there for review, as in Hudson R. R. Co. v. Day, above cited; or, filing a demurrer and agreement, setting the time to hear the same, as in the case of Case vs. Olney, above cited.

In order to succeed against its co-defendant, "The Frisco" in the trial court, it was necessary for the case of the defendants in Error to remain in that court for the adjudication of the rights of said plaintiff in error against the Frisco; and having elected to retain the case in that court in order to proceed against the Frisco, the plaintiffs in error have absolutely waived their right to insist on the removal proceedings.

But, after, having voluntarily made the Frisco a party defendant, it was necessary, in order for the said Plaintiff in Error to insist on its removal proceedings, for the Frisco to have joined in the said petition. This the Frisco failed to do, and the plaintiff in error was estopped from carrying into execution the removal of this cause to the Federal Court.

Look at the anomalous condition of this case had the plaintiffs in Error proceeded with their removal proceedings in the Circuit Court. There would have been a suit pending in this court between the plaintiffs and defendants in Error, and also the action in the state court between the plaintiffs and the defendants in Error, with the attachment thereto of

the collateral proceedings of the Plaintiffs in Error against the "Frisco." But to this, the reply may be essayed that the Plaintiff in Error would have remedied this in the circuit court. But no such action was attempted. But, if so, why go, not only to the expense on its own account, but, why put the other parties to the expense, especially the Frisco, of fighting an extra suit. It is admitted that the plaintiffs in Error have the right to resist with all their might, and to defend in every way they can in all the modes they may choose provided by the state law, as was well stated in the Tugman case, supra. But have they the right to lug in another party, and unnecessarily encumber that suit with a lot of costs as well as to heap on a third party,—one not already a party to the suit,—a lot of unnecessary costs? Again, have they the right thus to invoke the jurisdiction of a state court in any such manner as practically amounts to contumely? Will the comity that exists between the state and Federal courts permit any such action? In reply to this, it may be said that the state court had no right to proceed, and itself was violating the rules of comity. But this charge can not be successfully made. The trial court was acting upon a construction which it thought that this court had already made in the Martin case, supra, and which it believed would be followed up in this case. This construction had already been adopted by the Court of Civil Appeals in the Huber case, and which was affirmed, as we have shown, by the Supreme Court of Texas, (100 Tex. 1, 92 S. W. 833; and which it again twice re-affirmed in this very case, (99 Tex. 654, 92 S. W. 838, and 100 Tex. 556.)

In exercising the right which it constitutionally possessed, especially when sustained as it was by eminent authority,

the trial court in this case cannot be charged with ignoring the rules of comity which so happily exist between the two jurisdictions.

IV

From a careful analysis and consideration of the facts of this case, it is respectfully submitted, that we can not see how the conclusion can be escaped from, that the Plaintiffs in Error were not acting in good faith, when they filed their petition and bond for removal, bringing themselves clearly within the rules laid down by this Court, and by the courts cited herein; and that they have waived their right to remove, and, by their action, have restored, or revived, the jurisdiction of the state court,—that is, if it had ever been lost,—and that the judgment of the trial court should be affirmed.

Respectfully submitted,

THOS. D. SPORER,

Attorney for Defendants in Error.

H. C. McCLURE,

of Counsel.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* EASTIN & KNOX.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 177. Argued April 23, 1909.—Decided May 17, 1909.

The right of a defendant who has petitioned for removal of a case to the Federal court cannot be extended beyond what is necessary to defend the case; he cannot deny the jurisdiction after invoking it for affirmative relief.

A defendant's right to remove to the Federal court is amply protected. He may file his record in the Circuit Court and thereby completely take jurisdiction from the state court.

Even though a defendant's petition to remove is wrongfully denied by the state court, and in his answer he protests against the right of the state court to retain jurisdiction, if he asserts an affirmative remedy in the state court, as in this case in which he brought in a third party for liability over, he submits his whole case and cannot attack the action of the state court in denying his petition for removal in this court on writ of error.

100 Texas, 556, affirmed.

THIS action was instituted by defendant in error against plaintiff in error, the Texas and Pacific Railway Company, hereinafter called the Texas and Pacific Company, and J. M. Tucker, its agent, for wrongfully billing and shipping 712 head of cows and calves via one road, though they were requested to be shipped via another, whereby they were required to go twice as far, and were seriously injured and damaged thereby.

It is alleged in the original petition that plaintiffs in the action, defendants here, were residents of the county of Jack, State of Texas; that Tucker resided in the county of Palo Pinto in said State, and that the Texas and Pacific Company "is a body corporate, duly incorporated under the Federal statutes, with an office and station in the counties of Palo Pinto and Parker, in the State of Texas."

The Texas and Pacific Company filed an answer, and at the same time filed a petition and bond to remove the cases to the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth. The petition alleged as the ground of removal that Tucker was improperly and wrongfully joined with the company for the sole and only purpose of preventing it from removing the case to the United States Circuit Court. That the suit against the company was a suit arising under the laws of the United States, and more especially under the law of the United States constituting the charter of the company, under which it was incorporated. Tucker adopted the statements of the petition and joined in the application for removal. The application was denied, and an exception was entered to the ruling. The Texas and Pacific Company, protesting against the right of the court to hear and determine the suit, filed its amended original answer, among other defenses alleging that "it carried and delivered the cattle to Paris, Texas, safely and carefully on reasonable time," and further alleging that the St. Louis and San Francisco Company was duly incorporated and operated its line of railway in Lamar County, Texas, and had a local agent at Paris, and that most of the damage complained of by defendant (plaintiff in error) occurred on the line of that road. The Texas and Pacific Company asked that the St. Louis and San Francisco Railroad Company be made a party defendant, and that citation be served on it; that it be required to answer in the case, and that if plaintiff should recover against the Texas and Pacific Company the latter have judgment against the St. Louis and San Francisco Company for all such damages as were caused by it.

Subsequently, a second amended original answer was filed by the Texas and Pacific Company, in which it enlarged its defenses, and in what it called a "special and separate answer," averred its careful transportation of the cattle, and again averred the negligence of the St. Louis and San Francisco Company, and that but for such negligence, the damages of

which plaintiffs complain would not have occurred. The prayer of the answer was as follows:

"Wherefore, this defendant prays that citation be issued to the said St. Louis and San Francisco Railroad Company, by service upon its local agent herein aforesaid as the law directs, and that upon hearing hereof that the damages and injuries sustained by plaintiffs in the shipment of said cattle be according to law apportioned between the defendant and the St. Louis and San Francisco Railroad Company, and that this defendant be held liable only for such damages as occurred to said cattle while the same were in its possession, and that such damages and injuries as accrued to said cattle while same were in the possession of the St. Louis and San Francisco Railroad Company and its connecting carriers be charged to it. But if this defendant be mistaken in this, then it prays that upon hearing hereof that it have judgment over and against the said St. Louis and San Francisco Railroad Company for the full amount of any judgment that may be rendered against this defendant upon the trial hereof, and that it recover its costs in this behalf expended, as it will ever pray, etc., and for such general and special relief in law or equity, as it may be entitled to under the law and the facts."

A citation was issued in accordance with this prayer, and the St. Louis and San Francisco Company was summoned to appear "to answer the said amended answer of the Texas and Pacific Railway Company filed as aforesaid on the seventh day of April, A. D. 1904." The citation was duly served, together with certified copies of plaintiff's original petition and the amended answer of the Texas and Pacific Company, as directed by the citation. The St. Louis and San Francisco Company appeared in the action. In what is called its first amended original answer it demurred "generally to the answer and cross action" of the Texas and Pacific Company, on the ground that the same failed to show a cause of action. The answer also denied all the allegations of the "said pleadings of the Texas and Pacific Company," set up other defenses,

and alleged that if the cattle were damaged by delay in shipment "that the fault or liability" was that "of the Texas and Pacific Railway Company in not routing said cattle as requested by the plaintiffs and as demanded by the exigencies of the shipment," and "prayed to be hence dismissed with its costs." The issue thus made up was tried by the court and resulted in a judgment against the Texas and Pacific Company and Tucker for $3,600, and a judgment against the St. Louis and San Francisco Company in favor of the Texas and Pacific Company for $1,800. All the defendants appealed to the Court of Civil Appeals for the Second Judicial District, sitting at Fort Worth. That court reversed the decision and remanded the case, holding that the trial court erred in overruling the application for removal, and entertaining jurisdiction of the case. A motion for rehearing was made and denied and the plaintiffs (defendants in error here) applied to the Supreme Court of Texas for a writ of error, which was dismissed for want of jurisdiction, but was, on motion for rehearing, granted, and on the second of May, 1906, the Supreme Court reversed the Court of Civil Appeals, deciding that the case was not removable, and remanded the case for decision on the other questions.

On the return of the case to the Court of Civil Appeals, that court, on the sixteenth of June, 1906, affirmed the judgment of the District Court. A motion for rehearing was denied, and on writ of error to the Supreme Court the latter court affirmed the judgment of the Court of Civil Appeals.

Mr. Rush Taggart and *Mr. W. L. Hall*, with whom *Mr. John F. Dillon* was on the brief, for plaintiffs in error:

The Texas and Pacific Railway Company being a corporation chartered by Congress, when sued alone in the state court for an amount exceeding $2,000, exclusive of interest and costs, has the right to remove the cause to the Federal court, and when sued with a local defendant to establish a joint liability of all defendants it is a suit arising under the Constitution

and laws of the United States, and if all defendants join in the application to remove, the cause should be removed to the United States court. See charter, 16 Stat. 573; §§ 1 and 2, act of March 3, 1875, c. 137, amended by acts of 1887 and 1888; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Smith* v. *Union Pacific Railway*, 2 Dillon, 278; *Pacific Removal Cases*, 115 U. S. 200, 222; *Texas & Pacific Railway* v. *Cody*, 166 U. S. 606; *Re Dunn*, 212 U. S. 374.

Where the facts presented in a petition for removal show a cause of action properly removable from a state to a Federal court, the state court must take the facts as stated in the record and petition, and has no jurisdiction to pass upon any such questions. The right to pass upon the issues of fact made by the petition for removal is one for the Federal court, it having the exclusive province of passing upon such questions of fact. Black's Dillon on Removal, § 191; *Kounts* v. *B. & O. Ry.*, 104 U. S. 5; *Stone* v. *South Carolina*, 117 U. S. 430; *Burlington Ry. Co.* v. *Dunn*, 122 U. S. 513; *Daugherty* v. *K. C. & Ft. S. Ry.*, 138 U. S. 298.

Mr. Thomas D. Sporer, with whom *Mr. H. C. McClure* was on the brief, for defendants in error:

The plaintiff in error, after filing its petition and bond for removal, waived its right to remove by voluntarily appearing in the state court, and filing what it called its first amended original answer, by which it voluntarily impleaded and made the St. Louis & San Francisco Railway a party defendant and sought to recover a judgment over against it for damages and by recovering judgment against that defendant for $1,800. This latter proceeding was an affirmative action on its own part by which it elected to retain defendants in error in the state court, not for the purpose of defending itself, but to have the matter litigated and, at the same time, to prosecute its rights and enforce them, by obtaining a judgment of the state court against the St. Louis & San Francisco Railway Company—a party whom defendants in error had not sued.

While it is true that if the state court refused to order a removal, and retains its jurisdiction, and the petitioner is compelled to remain in the state court, he does not have to remain inactive and allow judgment by default to go against him. He has a right to remain and defend the suit against him. But there is this distinction. He can only defend. If he seeks to take affirmative action and appeal to the court for relief in order to better his condition, that is, asks for something independent of and alien to the plaintiff's case, he elects to submit to the jurisdiction of the court. After making this election he cannot insist on his removal proceeding and insist that the court has no jurisdiction to try the case. The Federal courts will not permit him to experiment with the courts or speculate with his cause of action.

He must be consistent. *C. I. & N. P. Ry. Co.* v. *Minn. & N. W. Ry. Co.*, 29 Fed. Rep. 337, 341. See also: *Manning* v. *Amy*, 140 U. S. 137; *Removal Cases*, 100 U. S. 457, 473; *Hudson River R. R. & Term. Co.* v. *Day*, 54 Fed. Rep. 545; *Case* v. *Olney*, 106 Fed. Rep. 433; *First National Bank of Wason* v. *Conway*, 67 Wisconsin, 210.

MR. JUSTICE MCKENNA, after stating the facts as above, delivered the opinion of the court.

The assignments of error present the question of the right of the Texas and Pacific Company to a removal of the case to the Circuit Court of the United States, (1) Because, being a corporation chartered under an act of Congress, the suit was one arising under the laws of the United States, and that this character was not taken from it by joining a local defendant when it was an action to establish a joint liability. (2) Where the facts stated in the petition for removal show a cause properly removable from a state to a Federal court, the state court has no jurisdiction to pass finally upon them; that right is one for the Federal court, it having the exclusive province of passing upon such questions of fact.

The first proposition is sustained in the *Matter of Dunn*, 212 U. S. 374; the second proposition is sustained in *Chesapeake and Ohio Railway* v. *Emma R. McCabe, Administratrix*, 213 U. S. 207. The latter case also decides that if an application for removal be denied the petitioner loses no right by being compelled to stay in the state court. In other words, that the petitioner may stay in the state court and defend the action against him, and if the judgment go against him bring the case to this court and have the question of removal determined. But plaintiffs in error did not defend only against the cause of action. They instituted a cause of action against the St. Louis and San Francisco Railroad Company, in which the defendant in error had no concern, and recovered a judgment against that company in the sum of $1,800. By doing so they invoked the jurisdiction of the state court on their own account and for their own purpose, and the case is brought within the ruling in *Merchants Heat & L. Co.* v. *Clow & Sons*, 204 U. S. 286.

The single question in this court in that case was the jurisdiction of the Circuit Court, from which the case came. The Merchants Heat & Light Company, an Indiana corporation, contended that no jurisdiction had been obtained over it by the service which was made upon one Schodd, who, it was asserted by the plaintiff in the action, was an agent of the company. A motion to quash the return of service was made and overruled, and thereupon the company, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract sued upon, and overcharges in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.

Whether the company was doing business in the State of Illinois within the meaning of the statutes of that State under which service was made, this court did not decide, but it did decide that the company, "by setting up its counter-claim became a plaintiff in its turn, invoking the jurisdiction of the

court in the same action, and, by invoking, submitted to it." And this, notwithstanding the counter-claim arose, as it was said, "out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper." It was further said: "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits." And the Texas and Pacific Company was an actor against the St. Louis and San Francisco Company upon a cause of action upon which it was its own choice to bring into the suit. On that cause of action it obtained a judgment against the St. Louis and San Francisco Company, and succeeded in having it affirmed by the Supreme Court of the State.

It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him. He should not be permitted to invoke the jurisdiction for affirmative relief and deny it afterwards. It must be remembered how amply his right of removal is protected. He may file the record in the Circuit Court of the United States and thereby completely take jurisdiction from the state court.

Judgment affirmed.

MR. JUSTICE PECKHAM and MR. JUSTICE DAY dissent.